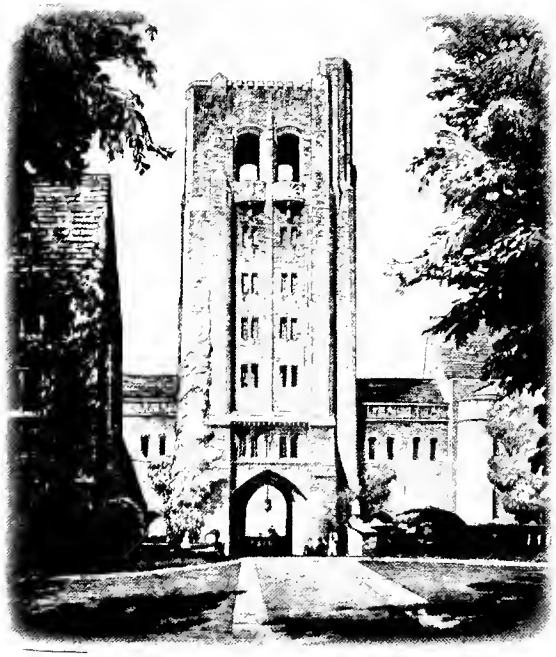

READINGS

ON THE

History and System of the Common Law

COMPILED BY

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PREFACE TO THE SECOND EDITION

In 1899 I was called on to give a course in the history and system of our law for college students. After some experimenting with lectures and an outline of prescribed readings, it seemed desirable to have extracts from the sources referred to and some other materials before the student in the lecture room in such form as to serve not merely for illustration but as the basis for class discussion. Accordingly, a short compilation of extracts was made which has gradually expanded into the present book. For some years the extracts were mimeographed and given out in parts. Thus it was possible to make changes and additions from year to year until in 1904 the increased numbers taking the course required that the readings be put in print. Accordingly, the first edition, published in that year, represented the original nucleus as shaped and in parts made over by experience of five years of use. Subsequently notes were kept of changes in and additions to the first edition which appeared desirable, and after I ceased to teach the subject others who used the book made further suggestions. The first edition having been exhausted, the compilation has been completely revised in the light of these notes and suggestions. But it still follows the lines and in the main embodies the contents of the mimeograph compilation of 1899.

Primarily the purpose of these readings is to provide in convenient form materials which may serve as a basis for discussion in class and for lectures and explanations which, unless the matter is before the student at the

moment, would be abstract, if not unintelligible. The first edition has been used also by first-year students in law schools who desire a survey of the history of the common law, and some preliminary view of its system. The needs of such students have been taken into account. But those who use the book in this way are recommended to read the first part of Pollock's First Book of Jurisprudence in connection with the first chapter, Jenks's Short History of English Law in connection with the second chapter, the second part of Pollock's First Book of Jurisprudence in connection with the third chapter, Warren's History of the American Bar in connection with the fourth chapter, and Holland's Elements of Jurisprudence or Salmond's Jurisprudence in connection with chapters eight to twelve.

In using such a compilation certain cautions are required. One who uses it should have a teacher or else should read with his eyes open and think critically as he reads. In the first place, the extracts are not always in accord with each other or with the ideas the editor has expressed in the insertions in smaller type. Perhaps it need not be said that choice of extracts proceeding on different theories has often been made deliberately in order to provoke thought and inquiry. Again, the historical material in the extracts from Blackstone and Kent must often be taken with caution and sometimes is valuable only as showing the ideas of legal history which governed legal thinking in a past generation. Moreover, the apocryphal reasons given by Blackstone and his imitators for doctrines which rest on historical grounds only must be scrutinized carefully. Where experience has shown that false impressions are likely to be formed which reading or instruction will not readily remove, notes have been inserted to challenge the attention of the student at once. But without such notes,

the reader should weigh all statements by his knowledge of history, philosophy, ethics and the social sciences.

What has been said as to the purpose of the compilation and the manner of its origin and growth will suffice to explain its contents. The historian may well wonder that some things are included and others excluded. As to these, the test of use in class has seemed to show what was best adapted to provoke profitable discussion. But little has been included as to the history of particular departments and particular doctrines, since here, especially in the law of property, history is a necessary part of the ordinary dogmatic instruction. With more reason, the jurist may say that the system is very scanty. No system is attempted in the law of torts, and elsewhere an elementary outline only is suggested. More than this seems unprofitable for beginners, since system, to be apprehended, must come after the student has some concrete materials with which to fill it out.

Perhaps an apology is due for making use of the translation of Bracton in Twiss' edition. Until Bracton's text is settled, it can hardly be profitable to make translations of one's own. But the unwary should be referred to Professor Vinogradoff's paper in 1 Law Quarterly Review, 189.

Grateful acknowledgment is made to the authors and publishers who have generously permitted the use of extracts from modern books. Every one who has to do with either the history or the system of our law is under a debt to Professor Wigmore. Beyond this, however, I am indebted to him for several important suggestions. My colleague, Professor Joseph Warren, and Professor H. W. Humble, of the University of Kansas, have also assisted by valuable criticisms.

ROSCOE POUND.

CAMBRIDGE, October 1, 1912.

ENCOMIA ON THE COMMON LAW

For the English Laws, although not written, may, as it should seem, and that without any absurdity, be termed Laws. . . . For, if from the mere want of writing only, they should not be considered as Laws, then, unquestionably, writing would seem to confer more authority upon Laws themselves, than either the Equity of the persons constituting, or the reason of those framing them. — Glanvill, Preface (1187).

The realm of England was first inhabited by the Britons; afterwards it was ruled and civilized under the government of the Romans; then the Britons prevailed again; next it was possessed by the Saxons, who changed the name of Britain into England. After the Saxons, the Danes lorded it over us, and then the Saxons prevailed a second time; at last the Normans came in, whose descendants retain the kingdom at this day: and during all that time, wherein those several nations and their kings prevailed, England has nevertheless been constantly governed by the same customs as it is at present: which if they were not above all exception good, no doubt but some or other of those kings, from a principle of justice, in point of reason, or moved by inclination, would have made some alteration, or quite abolished them. . . . So that there is no pretence to say, or insinuate to the contrary, but that the laws and customs of England are not only good, but the very best. — Fortescue, *De Laudibus Legum Angliae*, cap. 17 (about 1453).

And it is to be noted that all the deriving of reason in the law of England proceedeth of the first principles of the law, or of something that is derived of them; and therefore no man may right-wisely judge, ne groundly reason in the laws of England if he be ignorant in the first principles. — *Doctor and Student*, chap. 5 (1523).

For reason is the life of the law, nay the common law itselfe is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason; for, *nemo nascitur artifex.* This legall reason *est summa ratio.* And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath beene fined and refined by an infinite number of grave and learned men, and by long experience growne to such a perfection, for the government of this realme, as the old rule may be justly verified of it, *neminem opportet esse sapientiorem legibus:* no man out of his own private reason ought to be wiser than the law, which is the perfection of reason. — *Coke on Littleton*, 97*b* (1628).

Whereupon the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties declare. . . .

5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

6. That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances. — Declaration of Rights of the Continental Congress (1774).

You shall understand how great a heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer. So venerable, so majestic, is this living temple of justice, this immemorial and yet freshly growing fabric of the Common Law, that the least of us is happy who hereafter may point to so much as one stone thereof and say, The work of my hands is there. — Pollock, *Oxford Lectures*, 111.

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CHAPTER I

FUNDAMENTAL CONCEPTIONS

JUSTICE

The object of Law is the administration of justice. Law is a body of rules for the systematic and regular public administration of justice. Hence we may ask, at the outset, what is justice?[1]

INSTITUTES OF JUSTINIAN, I, 1, secs. 1, 3.

Justice is the set and constant purpose which gives to every man his due. The precepts of law are these: to live honorably, to injure no one, and to give every man his due.

KANT, RECHTSLEHRE (2 ed.), xxxiii.

Right is therefore the sum of the conditions under which the will of one can be brought into harmony with the will of another according to a universal law of freedom. Every act is right which, in itself, or in accordance with its maxim, can co-exist with the freedom of the will of each and all according to a universal law.

SPENCER, JUSTICE, sec. 27.

Hence, that which we have to express in a precise way, is the liberty of each limited only by the like liberties of all. This we do by saying: Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.

WILLOUGHBY, SOCIAL JUSTICE, 20–21.

Justice to the individual, then, must according to these principles consist in the rendering to him, so far as possible, all those

[1] Salmond, Jurisprudence (3 ed.), §§ 6, 7, 9, 10, 25, 26; Miller, the Data of Jurisprudence, chap. 6; Markby, Elements of Law, § 201; Gareis, Science of Law (Kocourek's translation), 48. See also, Bentham, Theory of Legislation, Principles of the Civil Code, pt. I, chaps. 1–7.

services, and surrounding him with all those conditions, which he requires for his highest self, for the satisfaction of those desires which his truest judgment tells him are good. Conversely, opportunity for fulfillment of highest aims is all that may be justly claimed as a right.[1]

PAULSEN, ETHICS (Thilly's translation), chap. 9.

Justice, as a moral habit, is that tendency of the will and mode of conduct which refrains from disturbing the lives and interests of others, and, as far as possible, hinders such interference on the part of others. This virtue springs from the individual's respect for his fellows as ends in themselves and as his co equals. The different spheres of interests may be roughly classified as follows: body and life; the family, or the extended individual life; property, or the totality of the instruments of action; honor, or the ideal existence; and finally freedom, or the possibility of fashioning one's life as an end in itself. The law defends these different spheres, thus giving rise to a corresponding number of spheres of rights, each being protected by a prohibition. . . . To violate the rights, to interfere with the interests of others, is injustice. All injustice is ultimately directed against the life of the neighbor; it is an open avowal that the latter is not an end in itself, having the same value as the individual's own life. The general formula of the duty of justice may therefore be stated as follows: Do no wrong yourself, and permit no wrong to be done, so far as lies in your power; or, expressed positively: Respect and protect the right.

POLLOCK, FIRST BOOK OF JURISPRUDENCE (3 ed.), 32–33.

Law presupposes ideas, however rudimentary, of justice. But, law being once established, just, in matters of the law, denotes whatever is done in express fulfillment of the rules of law, or is approved and allowed by law. Not everything which is not forbidden is just. Many things are left alone by the state, as it were under protest, and only because it is thought that interference would do more harm than good. In such things the notion of justice has

[1] "The old justice in the economic field consisted chiefly in securing to each individual his rights in property or contracts. The new justice must consider how it can secure for each individual a standard of living, and such a share in the values of civilization as shall make possible a full moral life." Dewey and Tufts, Ethics, 496.

no place. . . . The words "just" and "justice," and corresponding words in other tongues, have never quite lost ethical significance even in the most technical legal context. The reason of this (unduly neglected by some moderns for the sake of a merely verbal and illusive exactness) is that in the development of the law both by legislative and by judicial processes appeal is constantly made to ethical reason and the moral judgment of the community. Doubtless the servants of the law must obey the law, whether the specific rules of law be morally just in their eyes or not: this, however, is only saying that the moral judgment we regard is the judgment of the community, and not the particular opinion of this or that citizen. Further, some conflict between legal and moral justice can hardly be avoided, for morality and law can not move at exactly the same ratio. Still, in a well-ordered State such conflict is exceptional and seldom acute. Legal justice aims at realizing moral justice within its range, and its strength largely consists in the general feeling that this is so.

LAW [1]

Justice may be administered, according to the discretion of the person who administers it for the time being, or according to law. Law means uniformity of judicial action, — generality, equality, and certainty in the administration of justice. The advantages of law are: (1) It enables us to predict the course the administration of justice will take. (2) It prevents errors of individual judgment. (3) It protects against improper motives on the part of judicial officers. (4) It gives the magistrate the benefit of all the experience of his predecessors.

BLACKSTONE, COMMENTARIES, I, 44–46.

Thus much I thought it necessary to premise concerning the law of nature, the revealed law, and the law of nations before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian, "*jus civile est quod quisque sibi populus constituit.*" I call

[1] Salmond, Jurisprudence, chaps. 2 and 3; Holland, Elements of Jurisprudence, chaps. 2 and 3; Markby, Elements of Law, §§ 1–26; Gray, Nature and Sources of Law, chap. 4; Pollock, First Book of Jurisprudence, pt. 1, chap. 1; Austin, Jurisprudence, Lects. 1 and 5; Korkunov, General Theory of Law (Hastings' translation) 40–115; Clark, Practical Jurisprudence, pt. 1, chap. 7 to middle of p. 93, conclusion of chap. 11 (p. 134), conclusion of chap. 14 (p. 172); Maine, Early History of Institutions, chap. 13; Lee, Historical Jurisprudence, 1–5.

it municipal law, in compliance with common speech; for though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation which is governed by the same laws or customs.

Municipal law, thus understood, is properly defined to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." Let us endeavor to explain its several properties as they arise out of this definition. And, first, it is a rule: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a rule. It is also cal ed a rule, to distinguish it from advice or counsel, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the law depends not upon our approbation, but upon the maker's will. Counsel is only a matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

It is also called a rule to distinguish it from a compact or agreement; for a compact is a promise proceeding from us, law is a command directed to us. The language of a compact is, "I will, or will not, do this"; that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "a rule."

Municipal law is also "a rule of civil conduct." This distinguishes municipal law from the natural, or revealed; the former of which is the rule of moral conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his

neighbor, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbor than those of mere nature and religion: duties which he has engaged in by enjoying the benefits of the common union; and which amount to no more than that he do contribute, on his part, to the subsistence and the peace of the society. It is likewise "a rule prescribed." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, as is the case of the common law of England. It may be notified *viva voce*, by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament. . . . But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.

But farther: municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one can not subsist without the other.[1]

The term "civil law" is strictly and etymologically applicable to the special or peculiar system or body of laws of any particular state or people, for which we commonly employ the term municipal law. But the *jus civile Romanorum*, or legal system, of the Romans, was long preëminently the civil law. Hence the term came to mean Roman law; and it is too well fixed in that meaning to render

[1] Salmond, Jurisprudence (3 ed.), chap. 5; Holland, Elements of Jurisprudence, chap. 4; Markby, Elements of Law, §§ 31–38; Bryce, Studies in History and Jurisprudence, Essay 10; Austin, Jurisprudence, Lect. 6; Gray, Nature and Sources of Law, §§ 169–183; Jenks, Law and Politics in the Middle Ages, 68–71; Maine, Early History of Institutions, Lect. 12.

restoration of the true sense easy or perhaps advisable. "Municipal law," the term generally made use of to denote the system or body of law of a particular state, is unfortunately chosen, but well settled in good usage.

Three common uses of the term *law* require to be distinguished: These are (1) *Law* as used in the natural and physical sciences, (2) *Natural law*, or *law of nature*, as the term is used by writers on the philosophy of law, (3) *Law in the juridical sense.* In the natural sciences, *law* is used to mean deductions from human experience of the course of events. Thus, the "law of gravitation" is a record of human observation and experience of the manner in which bodies which are free to move do, in fact, move toward one another. By *natural law* or *the law of nature*, writers upon legal subjects mean the principles which philosophy and ethics discover as those which should govern human actions and relations. Laws of nature, in this sense, might be defined thus: "Rational and necessary inferences from the facts of nature, with respect to which obligatory rules of human conduct ought to be framed." *Law in the juridical sense* is: The body of rules recognized or enforced by public or regular tribunals in the administration of justice. The idea which the three have in common is order or regularity — the idea of a rule or principle underlying a sequence of events, whether natural or moral or judicial. It is usual to distinguish law in the juridical sense from so-called natural law under the name of positive law. The following extracts deal with law in the juridical sense.

HOLLAND, ELEMENTS OF JURISPRUDENCE, chap. 3 (conclusion).

A law, in the proper sense of the term, is therefore a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society. More briefly, a general rule of external human action enforced by a sovereign political authority.

All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only.

SALMOND, JURISPRUDENCE, sec. 5.

The law is the body of principles recognized and applied by the state in the administration of justice. Or, more shortly: The law consists of the rules recognized and acted on in courts of justice.

It will be noticed that this is a definition, not of *a* law, but of *the* law, and our first concern is to examine the significance of this distinction. The term *law* is used in two senses, which may be conveniently distinguished as the abstract and the concrete. In its abstract application we speak of the law of England, the law of libel, criminal law, and so forth. Similarly we use the phrases law and order, law and justice, courts of law. It is to this usage that

our definition is applicable. In its concrete sense, on the other hand, we say that Parliament has enacted or repealed a law. We speak of the by-laws of a railway company or municipal council. We hear of the commerce laws or the navigation laws. The distinction demands attention for this reason, that the concrete term is not co-extensive with the abstract in its application. Law or the law does not consist of the total number of laws in force. The constituent elements of which the law is made up are not laws but rules of law or legal principles. That a will requires two witnesses is not rightly spoken of as a law of England; it is a rule of English law. A law means a statute, enactment, ordinance, decree or any other exercise of legislative authority. It is one of the sources of law in the abstract sense. A law produces statute law, just as custom produces customary law, or as a precedent produces case-law.

JENKS, LAW AND POLITICS IN THE MIDDLE AGES, 1–3.

To a layman, the task of compiling a list of laws might seem the simplest of duties, demanding only the perseverance and accuracy of a good clerk and the technical knowledge of an average professional lawyer. A generation which has, consciously or unconsciously, imbibed the Austinian doctrine, that Law is a command of the State, cannot believe it possible that the State should have allowed any uncertainty to rest upon such an important act as the making of a law. Even a professed student of the Austinian theory, though he is aware of certain awkward inconsistencies in the doctrine of the great jurist, is inclined to regard these inconsistencies as belonging more to the theory than to the facts.

Nor is he, in truth, very far wrong. When all deductions have been made for uncertainties of interpretation, and authorities of doubtful validity, it is yet possible to say with tolerable certainty what is law and what is not, in the England or the France of today. The contents of legal systems may be complex and voluminous, but the idea of law is comparatively simple. Despite all criticism, Austin's main position is unassailable, regarded as a summary of existing facts. What the State wills, that, and that alone, can the individual be compelled to obey.

But this fact, suggestive as it is, loses half its value, unless it is regarded in its true historical perspective, as the final outcome of a long unconscious process, fraught with infinite moment to the human race. For, as we go back upon the history of Law, we very soon reach a point at which the Austinian theory is helpless to

explain the facts. Here is a "source" of law, an authority which, for some reason or another, great masses of men feel themselves bound to follow, not because they choose, but because they must. And yet it certainly is not a command of the State, direct or indirect. Upon critical examination, it may turn out to be the work of a mere private composer. Why do men obey it? Further back again, we find a purely impersonal document, compiled, no one exactly knows how, or by whom; and yet it is the controlling force which shapes the daily conduct of men. They do not even consider the possibility of disregarding it. It is not the work of the State, it may not even be recognized by the State, there may be no State to recognize it. Yet the essential ideas of Law, the evident ancestors of our modern juristic notions, are clearly there.

It is manifest then, that to the fundamental question, What is Law? no dogmatic or comprehensive answer can safely be given. Not only do systems of law change their contents, but the conception of Law itself changes with the progress of mankind.

GRAY, NATURE AND SOURCES OF LAW, §§ 191–194, 199, 203–205, 207–209, 211–213, 231.

Sec. 191. The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties. The difference in this matter between contending schools of Jurisprudence arises largely from not distinguishing between the Law and the Sources of the Law. On the one hand, to affirm the existence of *nicht positivisches Recht*, that is, of Law which the courts do not follow, is declared to be an absurdity; and on the other hand, it is declared to be an absurdity to say that the Law of a great nation means the opinions of half-a-dozen old gentlemen, some of them, conceivably, of very limited intelligence. The truth is, each party is looking at but one side of the shield. If those half-a-dozen old gentlemen form the highest judicial tribunal of a country, then no rule or principle which they refuse to follow is Law in that country. However desirable, for instance, it may be that a man should be obliged to make gifts which he has promised to make, yet if the courts of a country will not compel him to keep his promise, it is not the Law of that country that promises to make a gift are binding. On the other hand, those six men seek the rules which they follow not in their own whims, but they derive them from sources often of the most general and

permanent character, to which they are directed, by the organized body to which they belong, to apply themselves. I believe the definition of Law that I have given to be correct; but let us consider some other definitions of the Law which have prevailed and which still prevail.

Sec. 192. . . . There are three theories which have commended themselves to accurate thinkers, which have had and which still have great acceptance, and which deserve examination. In all of them it is denied that the courts are the real authors of the Law, and it is contended that they are merely the mouthpieces which give it expression.

Sec. 193. The *first* of these theories is that Law is made up of the commands of the sovereign. This is Austin's view. "Every positive law," he says, "obtaining in any community, is a creature of the Sovereign or State; having been established immediately by the monarch or supreme body, as exercising legislative or judicial functions; or having been established immediately by a subject individual or body, as exercising rights or powers of direct or judicial legislation, which the monarch or supreme body has expressly or tacitly conferred."

Sec. 194. In a sense, this is true; the State can restrain its courts from following this or that rule, but it often leaves them free tofollow what they think right; and it is certainly a forced expression to say that one commands things to be done, because he has power (which he does not exercise) to forbid their being done.

. . . . . .

Sec. 199. Austin's statement that the Law is entirely made up of commands directly or indirectly imposed by the State is correct, therefore, only on the theory that everything which the State does not forbid its judges to do, and which they in fact do, the State commands, although the judges are not animated by a direct desire to carry out the State's wishes, but by entirely different ones.

. . . . . .

Sec. 203. The *second* theory on the nature of Law is that the courts, in deciding cases, are, in truth, applying what has previously existed in the common consciousness of the people. Savigny is the ablest expounder of this theory. At the beginning of the *System des heutigen roemischen Rechts*, he has set it forth thus: "It is in the common consciousness of the people that the positive law lives, and hence we have to call it *Volksrecht*. . . . It is the *Volksgeist*, living and working in all the individuals in common, which begets

the positive law, so that for the consciousness of each individual there is, not by chance but necessarily, one and the same law. . . . The form in which the Law lives in the common consciousness of the people, is not that of abstract rule, but the living intuition of the institute of the Law in its organic connection. . . . When I say that the exercise of the *Volksrecht* in single cases must be considered as a means to become acquainted with it, an indirect acquaintance must be understood, necessary for those who look at it from the outside, without being themselves members of the community in which the *Volksrecht* has arisen and leads its continuous life. For the members of the community, no such inference from single cases of exercise is necessary, since their knowledge of it is direct and based on intuition."

Sec. 204. Savigny is careful to discriminate between the common consciousness of the people and custom: "The foundation of the Law," he says, "has its existence, its reality, in the common consciousness of the people. This existence is invisible. How can we become acquainted with it? We become acquainted with it as it manifests itself in external acts, as it appears in practice, manners, and custom. By the uniformity of a continuous and continuing mode of action, we recognize that the belief of the people is its common root, and not mere chance. Thus, custom is the sign of positive law, not its foundation."

Sec. 205. Savigny is confronted by a difficulty of the same kind as confronted Austin. The great bulk of the Law as it exists in any community is unknown to its rulers, and it is only by aid of the doctrine that what the sovereign permits he commands, that that Law can be considered as emanating from him; but equally, the great bulk of the Law is unknown to the people; how, then, can it be the product of their "common consciousness?" How can it be that of which they "feel the necessity as law?"

. . . . . .

Sec. 207. Savigny meets the difficulty thus: "The Law, originally the common property of the collected people, in consequence of the ramifying relations of real life, is so developed in its details that it can no more be mastered by the people generally. Then a separate class of legal experts is formed which, itself an element of the people, represents the community in this domain of thought. In the special consciousness of this class, the Law is only a continuation and peculiar development of the *Volksrecht.* The last leads, henceforth, a double life. In its fundamental principles it con-

tinues to live in the common consciousness of the people; the exact determination and the application to details is the special calling of the class of Jurisconsults."

Sec. 208. But the notion that the opinions of the Jurisconsults are the developed opinions of the people is groundless. In the countries of the English Common Law, where the judges are the jurists whose opinions go to make up the Law, there would be less absurdity in considering them as expressing the opinions of the people; but on the Continent of Europe, in Germany for instance, it is difficult to think of the unofficial and undeterminate class of jurists, past and present, from whose writings so great a part of the Law has been derived, as expressing the opinions of the people. In their reasonings, it is not the opinions of the people of their respective countries, Prussia, or Schwartzenburg-Sonderhausen, which guide their judgment. They may bow to the authority of statutes, but in the domain of Law which lies outside of statute, the notions on Law, if they exist and are discoverable, which they are mostly not, of the persons among whom they live, are the last things which they take into account. What they look to are the opinions of foreign lawyers, of Papinian, of Accursius, of Cujacius, or at the *elegantia juris*, or at "juristic necessity."

Sec. 209. The jurists set forth the opinions of the people no more and no less than any other specially educated or trained class in a community sets forth the opinions of that community, each in its own sphere. They in no other way set forth the *Volksgeist* in the domain of Law than educated physicians set forth the *Volksgeist* in the matter of medicine. It might be very desirable that the conceptions of the *Volksgeist* should be those of the most skillful of the community, but however desirable this might be, it is not the case. The *Volksgeist* carries a piece of sulphur in its waistcoat pocket to keep off rheumatism, and thinks that butchers cannot sit on juries.

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Sec. 211. A *third* theory of the Law remains to consider. That theory is to this effect: The rules followed by the courts in deciding questions are not the expression of the State's commands, nor are they the expression of the common consciousness of the people, but, although what the judges rule is the Law, it is putting the cart before the horse to say that Law is what the judges rule. The Law, indeed, is identical with the rules laid down by the judges, but those rules are laid down by the judges because they are the Law, they are not the Law because they are laid down by the judges, or, as the late

Mr. James C. Carter puts it, the judges are the discoverers, not the creators, of the Law. And this is the way that judges themselves are apt to speak of their functions.

Sec. 212. This theory concedes that the rules laid down by the judges correctly state the Law, but it denies that it is Law because they state it. Before considering the denial, let us look a moment at the concession. It is a proposition with which I think most Common-Law lawyers would agree. But we ought to be sure that our ideas are not colored by the theories or practice of the particular system of law with which we are familiar. In the Common Law, it is now generally recognized that the judges have had a main part in erecting the Law; that, as it now stands, it is largely based on the opinions of past generations of judges; but in the Civil Law, as we shall see hereafter, this has been true to a very limited extent. In other words, judicial precedents have been the chief material for building up the Common Law, but this has been far otherwise in the systems of the Continent of Europe. But granting all that is said by the Continental writers on the lack of influence of judicial precedents in their countries to be true, yet, although a past decision may not be a source of Law, a present decision is certainly an expression of what the Law now is. The courts of France today may, on the question whether a blank indorsement of a bill of exchange passes title, care little or nothing for the opinions formerly expressed by French judges on the point, but, nevertheless, the opinion of those courts today upon the question is the expression of the present Law of France, for it is in accordance with such opinion that the State will compel the inhabitants of France to regulate their conduct. To say that any doctrine which the courts of a country refuse to adopt is Law in that country, is to set up the idol of *nicht positivisches Recht*; and, therefore, it is true, in the Civil as well as in the Common Law, that the rules laid down by the courts of a country state the present Law correctly.

Sec. 213. The great gain in its fundamental conceptions which Jurisprudence made during the last century was the recognition of the truth that the Law of a State or other organized body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is. To fix this definitely in the Jurisprudence of the Common Law, is the feat that Austin accomplished. He may have been wrong in treating the Law of the State as being the command of the sovereign, but he was right in teaching

that the rules for conduct laid down by the persons acting as judicial organs of the State, are the Law of the State, and that no rules not so laid down are the Law of the State.

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Sec. 231. To sum up. The State exists for the protection and forwarding of human interests, mainly through the medium of rights and duties. If every member of the State knew perfectly his own rights and duties, and the rights and duties of everybody else, the State would need no judicial organs; administrative organs would suffice. But there is no such universal knowledge. To determine, in actual life, what are the rights and duties of the State and of its citizens, the State needs and establishes judicial organs, the judges. To determine rights and duties, the judges settle what facts exist, and also lay down rules according to which they deduce legal consequences from facts. These rules are the Law.

LAW AND MORALS[1]

AMOS, SCIENCE OF LAW, 43–45.

In all this story of universal development it will be observed that law can only take under its shadow a very small portion of the inherent life and force of each institution, though to the whole institution it gives so much. Law, indeed, marks out the limits of the family, and provides general remedies for the grosser violations of the integrity of the family. But it can go, and does go, a very little way towards making good husbands and wives, fathers and mothers, sons and daughters, brothers and sisters. Law can create and define the relations of landlord and tenant, farmer and laborer; but it is well known how little it can do directly to guide landlords in the rent they morally ought to exact, or the compensation for improvements made by an outgoing tenant which they ought to allow, or to compel farmers to remunerate their laborers, build cottages for them, and exact work from them in the way least likely to render them paupers in their old age.

So with contract. The operations of the market must meet with some other stimulus and guide than legal rules, if men are to be scrupulously honest in keeping their engagements, in selling

[1] Amos, Science of Law, chap. 3; Gray, Nature and Sources of Law, chap. 13; Pollock, First Book of Jurisprudence (3 ed.) 46–56; Dillon, Laws and Jurisprudence of England and America, 12–20; Korkunov, General Theory of Law (Hastings' translation), 47–64; Ames, Law and Morals, 22 Harv. Law Rev. 97.

pure and unadulterated goods, in laying bare all the hidden vices of the things for which they are endeavoring to find customers. Law can do none of these things directly. Indeed, by trying to do them directly it may only weaken that force of morality which alone is equal to the task.

Law can do much, however, indirectly. It defines the field and the different portions of the field within which moral agencies are called to work. Law is the constant and visible representative of an universal interest outside the individual interest of each man and household. The best and most vigilant of men might be tempted to invade the moral claims of their neighbors, if they were not forcibly reminded of the great and strong fence by which those claims are encompassed. In the same way the weak, credulous, and thoughtless might be easily seduced from time to time to part with their moral birthright of liberty, and to render themselves the contemptible slaves of the strongest in the neighborhood, if the law did not stand by them, to remind them as much of their moral as of their legal rights, and to warn transgressors of their legal as well as of their moral duties. Thus it is well for all men, in the course of perfecting their moral nature, to have ever at hand a grand, visible, and practical witness to the claims of their brother men, to the subordination of the individual person to the State, and of the subserviency of all individual action and life to the accomplishment of the general aim of humanity.

Lastly, and perhaps more than all, it is in securing to individual men a free field of undisturbed work and life — in other words, in securing personal liberty — that law exhibits its main moral efficacy. Men cannot be virtuous unless they are free, and they cannot be free unless they are strongly guarded against the occasional license or permanent selfishness of those who might impair their security. Nor is it only against the violent and the bad that this security for freedom is needed. It is needed likewise against the well-intentioned and conscientious, who have not learned to respect the solitude of the human spirit nor to refrain from giving rein to their own capricious tempers and passions. Law respects and guards the liberty of all, and, before the law itself is broken, shelters the independence of the vile and worthless with as much jealousy and alacrity as that of the deserving and the rich.

POLLOCK, FIRST BOOK OF JURISPRUDENCE (3d ed., 46–48).

The possible coincidence of law with morality is limited, at all events, by the range of that which theologians have named external

morality. The commandment, "Thou shalt not steal," may be, and in all civilized countries is, legal as well as moral: the commandment, "Thou shalt not covet," may be of even greater importance as a moral precept, but it cannot be a legal one. Not that a legislator might not profess to make a law against covetousness, but it would be inoperative unless an external test of covetousness were assigned by a more or less arbitrary definition; and then the real subject-matter of the law would be not the passion of covetousness, but the behavior defined as evincing it. The judgment of law has to proceed upon what can be made manifest, and it commonly has to estimate human conduct by its conformity, or otherwise, to what has been called an external standard. Action, and intent shown in acts and words, not the secret springs of conduct in desires and motives, are the normal materials in which courts of justice are versed, and in the terms of which their conclusions are worked out and delivered. With rare exceptions, an act not otherwise unlawful in itself will not become an offense or legal wrong because it is done from a sinister motive, nor will it be any excuse for an act contrary to the general law, or in violation of any one's rights, to show that the motive from which it proceeded was good. If the attempt is made to deal with rules of the purely moral kind by judicial machinery, one of two things will happen. Either the tribunal will be guided by mere isolated impressions of each case, and therefore will not administer justice at all; or (which is more likely) precedent and usage will beget settled rule, and the tribunal will find itself administering a formal system of law, which in time will be as technical, and appeal as openly to an external standard, as any other system. This process took place on a great scale in the formation of the Canon Law, and on a considerable scale in the early history of English equity jurisdiction.

BLACKSTONE, COMMENTARIES, I, 41.

This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to every other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.[1]

[1] Maine, Ancient Law, chap. IV, and Sir Frederick Pollock's note G; Bryce, Studies in History and Jurisprudence, Essay 11; Holland, Elements of Juris-

LOAN ASSOCIATION v. TOPEKA, SUPREME COURT OF THE UNITED STATES, 1874, 20 Wall. 655, 662.

Miller, J.: It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic repository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of the governments, are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, — implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C. and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.[1]

BONHAM'S CASE, COMMON PLEAS, 1610 (8 Rep. 118*a*).

Lord Coke: And it appears in our books, that in many cases the common law will control acts of parliament, and sometimes

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prudence, chap. 3, subdivision I; Markby, Elements of Law, §§ 116–117; Korkunov, General Theory of Law (Hastings' translation), 116–138. See also Grotius (Whewell's transation), Bk. I, chap. 1, §§ x–xii. For an exposition of jurisprudence from this standpoint, see Lorimer, Institutes of Law (2 ed.)

[1] See Marshall, C. J., in *Fletcher* v. *Peck*, 6 Cranch, 87, 135; Chase, J., in *Calder* v. *Bull*, 3 Dall. 386, 388; Field, J., in *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; Harlan, J., in *Chicago B. & Q. R. Co.* v. *Chicago*, 206 U. S. 226, 237; Cobb, J., in *Pavesich* v. *Life Ins. Co.*, 122 Ga. 190, 194; Winslow, J., in *Nunemacher* v. *State*, 129 Wis. 190, 198–203.

adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void. . . . So if an act of parliament gives to any to hold, or to have conusance of, all manner of pleas arising before him within the manor of D., yet shall he hold no plea, to which he himself is a party: for, as hath been said, *iniquum est aliquem suae rei esse judicem.*[1]

CITY OF LONDON v. WOOD, KING'S BENCH, 1701 (12 Mod. 669, 687–688).

Lord Holt: And what my Lord Coke says in Dr. Bonham's Case in his 8 Co. is far from any extravagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature; but it cannot make one that lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B., but it may make the wife of A. to be the wife of B. and dissolve her marriage with A.

This notion that there is an appeal from legislation to common right and reason or to the law of nature, and that courts are bound to give effect to the latter as against positive law in conflict therewith, formerly had no little vogue and still reappears in occasional *dicta*, sometimes as an absolute dogma,[2] sometimes as a mere rule of moral obligation, and sometimes in its true place of a rule of interpretation.

In practice we may admit two propositions only:

(a) As between a man and his conscience, he may under some circumstances be justified morally in disobeying a law. He may appeal to his reason and conscience for internal justification; but the courts can and will look only to the law.

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[1] See Coxe, Judicial Power and Unconstitutional Legislation, Chap. 16.

[2] "Whatever the objections of the common law of England, there is a law higher in this country, and one better suited to the rights and liberties of the American people — that law which accords to every citizen the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences,

(b) There are certain points of contact between law and morals, where the courts look primarily to general principles of right and justice for guidance. These are three: discretion, judicial law-making, and interpretation.

UNITED STATES v. HARMON, UNITED STATES DISTRICT COURT, DISTRICT OF KANSAS, 1891 (45 Fed. Rep. 414, 422).

[Indictment for sending obscene matter through the mails. Defendant contended that he acted for the public good, with upright motives, to promote knowledge of sexual hygiene.]

Philips, J.: The proposition is that a man can do no public wrong who believes that what he does is for the ultimate public good. The underlying vice of all this character of argument is that it leaves out of view the existence of the social compact, and the idea of government by law. If the end sought justifies the means, and there were no arbiter but the individual conscience of the actor to determine the fact whether the means are justifiable, homicide, infanticide, pillage and incontinence might run riot. . . . Society is organized on the theory, born of the necessities of human well-being, that each member yields up something of his natural privileges, predilections, and indulgences for the good of the composite community; and he consents to all the motto implies, *salus populi suprema est lex;* and, as no government can exist without law, the law-making power within the limits of constitutional authority, must be recognized as the body to prescribe what is right and prohibit what is wrong. It is the very incarnation of the spirit of anarchy for a citizen to proclaim that like the heathen he is a law unto himself.

BERTHOLF v. O'REILLY, COURT OF APPEALS OF NEW YORK, 1878 (74 N. Y. 509).

Andrews, J.: If an Act can stand when brought to the test of the Constitution, the question of its validity is at an end, and neither the executive nor the judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the *dicta* of learned judges, but has not been approved,

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the professions, or other vocations. This right may not, of course, be pursued in violation of laws, but must be held to exist so long as not forbidden by law." *In re Leach*, 134 Ind. 665, 668. See *Lanier* v. *Lanier*, 5 Heisk. (Tenn.) 462, 465; *Jeffers* v. *State*, 33 Ga. 367.

so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities. . . . No law can be pronounced invalid, for the reason simply that it violates our notions of justice, is oppressive and unfair in its operation, or because, in the opinion of some or all of the citizens of the State, it is not justified by public necessity, or designed to promote the public welfare. We repeat, if it violates no constitutional provision, it is valid and must be obeyed.[1]

BOUVIER, LAW DICTIONARY.

Discretion—The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

NORRIS v. CLINKSCALES, SUPREME COURT OF SOUTH CAROLINA, 1896 (47 S. C. 488).

Benet, J.: The term discretion implies the absence of a hard and fast rule. The establishment of a clearly defined rule would be the end of discretion. And yet discretion should not be a word for arbitrary will or unstable caprice.

HAYWOOD v. COPE, ROLLS COURT, 1858 (25 Beav. 140, 151).

Romilly, M. R.: It is most important that the profession, and those who have to advise in reference to this subject should understand the rule which is adopted in this and the other courts, which is, that the discretion of the courts must be exercised according to fixed and settled rules; you can not exercise a discretion by merely considering what, between the parties, would be fair to be done; what one person may consider fair, another person may consider very unfair; you must have some settled rule and principle upon which to determine how that discretion is to be exercised.

Four propositions may be laid down with reference to the exercise of discretion: (1) Whether or not a matter is one for law or for discretion is settled by law, and the court has no power to put it in the one category or the other at pleasure. A court has no discretion to apply the law or not as it sees fit. (2) Where discretion is conferred, it must really be exercised as such; the court cannot act oppressively or arbitrarily under pretence of exercising discretion. Such arbitrary or oppressive action under color of exercising discretion is called abuse of

[1] Compare Iredell, J., in *Calder* v. *Bull*, 3 Dall. 386, 398–399.

discretion. (3) If discretion reposed in a court or judge is in fact exercised as such, the manner of its exercise will not be reviewed. (4) But if the discretion is abused, the abuse may be reviewed and corrected by a higher tribunal.

Judicial law-making refers to decision by judges of cases of a novel character, not governed or imperfectly governed by existing rules of law, whereby new rules arise. It is partly a survival from times when there was little or no legislation, and when legislative and judicial functions were undifferentiated and confused, partly a necessity by reason of the impossibility of foreseeing the infinite variety of controversies upon which courts must pass and of establishing principles for their determination in advance. Its scope and importance in our system of law are gradually diminishing. Like judicial discretion, this power is not arbitrary and unrestricted, but must be exercised along well-settled lines. The chief agent in judicial law-making is analogy, and the process consists in choosing between competing analogies of existing rules and selecting that which appears most in harmony with the rest of the legal system and most consonant with reason and justice.

SOHM, INSTITUTES OF ROMAN LAW (Ledlie's translation), 2 Ed. § 8.

Having thus ascertained the rule of law, jurisprudence must next proceed to develop, or work out, its contents. A rule of law may be worked out either by developing the consequences which it involves, or by developing the wider principles which it presupposes. For one rule of law may involve a series of more specific rules of law; it may be a major premiss involving a series of minor premisses. Or again, the given rule of law itself may be the consequence of more general rules; it may be a minor premiss presupposing certain major premisses. The more important of these two methods of procedure is the latter, *i.e.* the method by which, from given rules of law, we ascertain the major premisses which they presuppose. For having ascertained such major premisses, we shall find that they involve, in their logical consequences, a series of other legal rules not directly contained in the sources from which we obtained our rule. The law is thus enriched, and enriched by a purely scientific method. When a given rule of law is so used as to lead us, by an inductive process, to the discovery of a major premiss, the ascertainment of new rules by means of the major premiss thus discovered is termed the 'analogical application' of the given rule of law. The application, then, of a principle (a major premiss) which is *given*, we call the method of Inference; the application of a principle which we have *found*, we call the method of Analogy.

The scientific process by means of which principles are discovered which are not immediately contained in the sources of law

may be compared to the analytical methods of chemistry. It is in this sense that Jhering has spoken of a 'juristic chemistry.' Jurisprudence analyses a legal relation which is regulated by a rule of law into its elements. It discovers that amidst the whole new mass of legal relations which are for ever emerging into new existence from day to day — endless and apparently countless — there are, nevertheless, certain elements, comparatively few in number, which are perpetually recurring merely in different combinations. These elements constitute, in the language of Jhering, the 'alphabet of law.' The common element, for instance, in every agreement, whether it be an agreement to purchase or to hire or to create a pledge-right, etc., is just *the agreement*, in other words, the expression of consensus. An exhaustive enumeration of the legal rules concerning sales must necessarily include certain rules bearing on this element in every contract of sale, viz. the expression of the concordant will of the parties. Thus from the legal rules concerning sales we gather certain major premisses, or general rules, concerning this element of 'agreement,' which rules will accordingly determine the requirements that are necessary to constitute an agreement, the effect of error, of conditions, or other collateral terms, and so forth. They are major premisses involving a countless variety of other legal rules, which will assist us in fixing the conditions under which other agreements, say, to hire, to deliver, to institute some one heir, and many others, are effectually completed, subject, of course, to such modifications as may be necessitated by a different set of major premisses. Thus, in applying the method of analogy to a rule of law, we are, at the same time, discovering the ingredients of the legal relations. The method of analogy does not mean (as the lay mind is apt to imagine) the application of a given rule of law to a legal relation of a somewhat *similar* kind. Such an analogy would be the very opposite of scientific jurisprudence. It is the application of a given rule not to a merely similar relation, but to the *identical relation*, in so far as the *identical element* (to which the given rule had already assigned its proper place) is traceable in a legal relation which is apparently different.

These, then, are the methods by which jurisprudence attains to a full knowledge of the materials of the law, and filling up the blanks which it finds there, moulds the whole into completeness. The discovery of the elements which recur in every legal relation brings with it the discovery of rules of law which meet the just requirements of every legal relation. The mode of proceeding may be

either by Analogy, *i.e.* by the discovery of those elements and the analysis of legal relations; or by Inference, *i.e.* by the practical application of those elements and the synthesis of legal relations. It is not by the legislator, but by scientific jurisprudence, that the complexity of human relations is regulated.

BLACKSTONE, COMMENTARIES, I, 59–61.

The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable.[1] And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Pufendorf which forbade a layman to lay hands on a priest, was adjudged to extend to him who had hurt a priest with a weapon. Again, terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the princess Sophia and the heirs of her body, being Protestants," it becomes necessary to call in the assistance of lawyers to ascertain the precise idea of the words "heirs of her body," which, in a legal sense, comprise only certain of her lineal descendants.

2. If words happen to be still dubious, we may establish their meaning from the context, with which it may be of singular use to

[1] "A fundamental misconception prevails, and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." Gray, Nature and Sources of Law, § 370. See Austin, Jurisprudence (3 Ed.), 1023–1035; Clark, Practical Jurisprudence, 230–244.

compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of Parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the subject matter, words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III forbids all ecclesiastical persons to purchase provisions at Rome, it might seem to prohibit the buying of grain and other victual; but, when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called provisions, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the effects and consequence, the rule is, that where the words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Pufendorf, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street in a fit.

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the treatise ascribed to Herennius. There was a law that those who in a storm forsook the ship should forfeit all property therein; and that the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who, by reason of his disease, was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now

here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit which he could never pretend to, who neither stayed in the ship on that account, nor contributed anything to its preservation.

From this method of interpreting laws by the reason of them, arises what we call equity, which is thus defined by Grotius: "the correction of that wherein the law (by reason of its universality) is deficient." For, since in laws all cases can not be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, *lex non exacte definit, sed arbitrio boni viri permittit.*

SHARSWOOD'S NOTE to the foregoing passage.

What the learned commentator here says is certainly inaccurate, if it leads to the supposition that any other rules of interpretation are applied to statutes in courts of equity than in courts of law. On the contrary, herein equity follows the law. . . What the commentator does mean, perhaps, is what is generally termed the equity of a statute, which is in reality a compendious mode of expressing his fifth rule of interpretation. Those cases are said to be within the equity of a statute which, though not directly comprehended by its language, are nevertheless within the intention of the lawgiver, reached by its reason and spirit.

SALMOND, FIRST PRINCIPLES OF JURISPRUDENCE, 83–84.

We have defined a principle of law as a principle recognized and acted upon by the State in the administration of justice. It follows that the validity of a legal principle is entirely independent of its truth. It is a principle of law, not because it is true, but because it is accepted and acted upon by the State as true. That two and two make five is open to grave objections as a principle of mathematics, but may be a perfectly valid rule of law. As Hobbes says: *Authoritas non veritas facit legem.* Nor does the existence of a legal principle imply or involve any belief in its truth. To accept a principle as true for the purposes of action is a different thing

from believing it to be true; for though a principle be not true, it may be expedient to act upon it as if it were.

Hence a divergence of law from truth and fact is in all cases possible, and in many cases expedient, and in all legal systems such a divergence exists to a very great extent. We have ever to distinguish that which is in deed and in truth from that which is in law. Negligence in fact is not necessarily negligence in law and *vice versa*. Fraud in fact may not be fraud in law; malice in law may not be malice in fact.

. . . . . .

Since the aim of the administration of justice is the maintenance or protection of rights, it follows that among the most important of legal principles must be those defining rights. Now the law may recognize as a right that which is not so in truth, or may fail to recognize one which in truth exists. Hence we have to distinguish between rights in fact and rights in law, that is to say, between natural rights and legal rights. And similarly of wrongs, duties, and liabilities.

CHAPTER II

HISTORY OF THE COMMON LAW

There are two great systems of law, the Roman or Civil Law and the English or Common Law. Roman law, beginning as the law of the city of Rome, became the law of the Roman Empire and thus of the ancient world, and eventually by absorption or reception from the twelfth to the eighteenth century, the law of modern continental Europe. It is now the foundation or a principal ingredient of the law in continental Europe, including Turkey, Scotland, Central and South America, Quebec and Louisiana, and all Spanish, Portuguese, or Dutch colonies or countries settled by those peoples. The common law, Germanic in origin, was developed by the English courts from the thirteenth to the nineteenth centuries, and has spread over the world with the English race. It now prevails in England and Ireland; the United States, except Louisiana; Canada, except Quebec; Australia; India, except over Hindus and Mohammedans as to inheritance and family law; and the principal English colonies except in South Africa.

DOCTOR AND STUDENT, Dialogue II, Chap. 2 (first printed in Latin, 1523, English version first printed in 1530).

The Common law is taken three manner of ways. *First*, it is taken as the law of this realm of England, dissevered from all other laws. And under this manner taken it is oftentimes argued in the laws of England, what matters ought of right to be determined by the Common law, and what by the admiral's court, or by the spiritual court: and also if an obligation bear date out of the realm, as in Spain, France, or such other, it is said in the law, and truth it is, that they be not pleadable at the Common law. *Secondly*, the Common law is taken as the king's courts of his Bench, or of the Common Place: and it is so taken when a plea is removed out of antient demesne, for that the land is frank-fee, and pleadable at the Common law, that is to say, in the king's court, and not in antient demesne. And under this manner taken, it is oftentimes pleaded also in base courts, as in Courts-Barons, the County, and the court of Piepowders, and such other, this matter or that, &c. ought not to be determined in that court, but at the Common law, that is to say, in the king's courts, &c. *Thirdly*, by the Common law is understood such things as were law before statute made in that point that is in question; so that that point was holden for law by the general or particular customs and maxims of the realm, or by the law of reason, and the law of God, no other law added to them by statute, nor otherwise, as is the case before rehearsed in

the first chapter, where it is said, that at the Common law, tenant by the courtesy, and tenant in dower were punishable of waste, that is to say, that, before any statute of waste made, they were punishable of waste by the grounds and maxims of the law used before the statute made in that point. But tenant for term of life, one for term of years, were not punishable by the said grounds and maxims, till by the statute remedy was given against them; and therefore it is said, that at the Common law they were not punishable of waste.

DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 155.

Now the great fact which, as we approach this subject, meets our view, is that the common law (including in the phrase "common law," as here used, the supplemental equity system of the Court of Chancery which grew out of the common law and constitutes a part of it) underlies the whole system of American law and jurisprudence. The expression, "the common law," is used in various senses: (a) sometimes in distinction from statute law; (b) sometimes in distinction from equity law; and (c) sometimes in distinction from the Roman or civil law. I use it in this lecture in the latter sense. I do not stop to inquire how the common law came to be introduced here and adopted by us. I deal with the fact as it exists, which is that the common law is the basis of the laws of every state and territory of the union, with comparatively unimportant and gradually waning exceptions. And a most fortunate circumstance it is, that, divided as our territory is into so many states, each supreme within the limits of its power, a common and uniform general system of jurisprudence underlies and pervades them all; and this quite aside from the excellences of that system, concerning which I shall presently speak. My present point is this: That the mere fact that one and the same system of jurisprudence exists in all of the states, is of itself of vast importance, since it is a most powerful agency in promoting commercial, social, and intellectual intercourse, and in cementing the national unity.

The history of the common-law system[1] may be treated of conveniently under five heads: (1) English law before the Conquest, (2) the development of the common law, (3) the development of equity, (4) the law merchant, (5) the reform-movement.

[1] Reference may be made to Holdsworth, History of English Law (3 vols. 1903–1909). This supersedes Reeve, History of the English Law (new edition

1. ENGLISH LAW BEFORE THE CONQUEST

POLLOCK, ENGLISH LAW BEFORE THE NORMAN CONQUEST, 14 Law Quar. Rev. 291.

For most practical purposes, the history of English law does not begin till after the Norman Conquest, and the earliest things which modern lawyers are strictly bound to know must be allowed to date only from the thirteenth century, and from the latter half of it rather than the former. Nevertheless a student who does not look further back will be puzzled by relics of archaic law which were not formally discarded until quite modern times, and he may easily be misled by plausible but incorrect explanations of them such as have been current in Blackstone's time and much later. . . . The extreme antiquities of our law may not often be required in practice, but it is not safe to neglect them altogether, and still less safe to accept uncritical explanations when it does become necessary to consider them.

From the LAWS OF ETHELBERT (Kent, about 600 A.D.).[1]

[This and the succeeding extracts from the Anglo-Saxon laws are from Thorpe's translation.]

33. If there be seizing by the hair, let there be L scaetts for bot.

34. If there be an exposure of the bone, let bot be made with III shillings.

35. If there be an injury of the bone, let bot be made with IV shillings.

36. If the outer bone be broken, let bot be made with X shillings.

37. If it be both, let bot be made with XX shillings.

38. If a shoulder be lamed, let bot be made with XXX shillings.

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in 3 vols. 1869). Pollock and Maitland, History of English Law Before the Reign of Edward I (2 vols. 1895, second edition, 1898) does not go beyond the thirteenth century. A useful collection of papers on particular topics is Select Essays in Anglo-American Legal History (3 vols. 1907, 1908, 1909). For a brief sketch the student may be recommended to Jenks, Short History of English Law (1912).

[1] The best edition of the Anglo-Saxon Laws is Liebermann, Gesetze der Angelsachsen (2 vols. 1903, 1906). There is an English edition (text and translation) by Thorpe, Ancient Laws and Institutes of England (2 vols. 1840). Reference may be made also to Essays in Anglo-Saxon Law (by Adams, Lodge, Young and Laughlin, 1876).

39. If an ear be struck off, let bot be made with XII shillings.

40. If the other ear hear not, let bot be made with XXV shillings.

41. If an ear be pierced, let bot be made with III shillings.

42. If an ear be mutilated, let bot be made with VI shillings.

43. If an eye be (struck) out, let bot be made with L shillings.

44. If a mouth or an eye be injured, let bot be made with XII shillings.

45. If the nose be pierced let bot be made with IX shillings.

46. If it be one ala let bot be made with III shillings.

47. If both be pierced, let bot be made with VI shillings.

48. If the nose be otherwise mutilated, for each let bot be made with VI shillings.

49. If it be pierced, let bot be made with VI shillings.

50. Let him who breaks the chin-bone pay for it with XX shillings.

51. For each of the four front teeth, VI shillings; for the tooth which stands next to them, IV shillings; for that which stands next to that, III shillings; and then afterwards, for each a shilling.

52. If the speech be injured, XII shillings. If the collar bone be broken, let bot be made with VI shillings.

53. Let him who stabs (another) through an arm, make bot with VI shillings. If an arm be broken, let him make bot with VI shillings.

54. If a thumb be struck off, XX shillings. If a thumb nail be off, let bot be made with III shillings. If the shooting (*i.e.* fore) finger be struck off, let bot be made with VIII shillings. If the middle finger be struck off, let bot be made with IV shillings. If the gold (*i.e.* ring) finger be struck off, let bot be made with VI shillings. If the little finger be struck off, let bot be made with III shillings.

55. For every nail a shilling.

56. For the smallest disfigurement of the face, III shillings; and for the greater, VI shillings.

57. If anyone strike another with his fist on the nose, III shillings.

58. If there be a bruise, a shilling; if he receive a right hand bruise, let him (the striker) pay a shilling.

59. If the bruise be black in a part not covered by the clothes, let bot be made with XXX scaetts.

60. If it be covered by the clothes, let bot for each be made with XX scaetts.[1]

61. If the belly be wounded let bot be made with XII shillings; if it be pierced through, let bot be made with XX shillings.

From the LAWS OF ALFRED (Wessex, about 890 A.D.).

We also command: that the man who knows his foe to be homesiting fight not before he demand justice of him.[2] If he have such power that he can beset his foe, and besiege him within, let him keep him within for VII days, and attack him not, if he will remain within. And then, after VII days, if he will surrender, and deliver

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[1] Compare Salic Law, Tit. XIV, §§ 1–3. 1. If anyone have assaulted and plundered a free man and it be proved on him, he shall be sentenced to 2500 denars, which make 63 shillings. 2. If a Roman have plundered a Salian Frank, the above law shall be observed. 3. But if a Frank have plundered a Roman, he shall be sentenced to 35 shillings.

"The Laws of the Twelve Tables seem to have divided Thefts into Manifest and Non-Manifest, and to have allotted extraordinarily different penalties to the offence according as it fell under one head or the other. The Manifest Thief was he who was caught within the house in which he had been pilfering, or who was taken while making off to a place of safety with the stolen goods; the Twelve Tables condemned him to be put to death if he were already a slave, and, if he was a freeman, they made him the bondsman of the owner of the property. The Non-Manifest Thief was he who was detected under any other circumstances than those described; and the old code simply directed that an offender of this sort should refund double the value of what he had stolen. In Gaius's day the excessive severity of the Twelve Tables to the Manifest Thief had naturally been much mitigated, but the law still maintained the old principle by mulcting him in fourfold the value of the stolen goods, while the Non-Manifest Thief still continued to pay merely the double. The ancient lawgiver doubtless considered that the injured proprietor, if left to himself, would inflict a very different punishment when his blood was hot from that with which he would be satisfied when the Thief was detected after a considerable interval; and to this calculation the legal scale of penalties was adjusted. The principle is precisely the same as that followed in the Anglo-Saxon and other Germanic codes, when they suffer a thief chased down and caught with the booty to be hanged or decapitated on the spot, while they exact the full penalties of homicide from anybody who kills him after the pursuit has been intermitted. These archaic distinctions bring home to us very forcibly the distance of a refined from a rude jurisprudence." Maine, Ancient Law, 379–380.

[2] "We decree and direct by this edict that he who intends to do damage to another, or to injure him, shall give him notice at least three days before, by a safe messenger." Decree of the Diet of the German Empire at Nürnberg (1187).

up his weapons, let him be kept safe for XXX days, and let notice of him be given to his kinsmen and his friends. If, however, he flee to a church, then let it be according to the sanctity of the church, as we have before said above. But if he have not sufficient power to besiege him within, let him ride to the ealdorman and beg aid of him. If he will not aid him, let him ride to the king before he fights. In like manner also, if a man come upon his foe, and he did not before know him to be home-staying; if he be willing to deliver up his weapons, let him be kept for XXX days, and let notice of him be given to his friends, if he will not deliver up his weapons then he may attack him. If he be willing to surrender, and to deliver up his weapons, and anyone after that attack him, let him pay as well wer as wound, as he may do, and wite, and let him have forfeited his maegship. We also declare, that with his lord a man may fight without risk of legal consequences, if anyone attack the lord; thus may the lord fight for his man. After the same wise, a man may fight with his born kinsman, if a man attack him wrongfully, except against his lord. That we do not allow. And a man may fight without legal consequences, if he find another with his lawful wife, within closed doors, or under one covering, or with his lawfully born daughter, or with his lawfully born sister, or with his mother, who was given to his father as his lawful wife.

From ALFRED AND GUTHRUM'S PEACE (A.D. 879).

2. Then is this: If a man be slain, we estimate all equally dear, English and Danish, at viii half marks of pure gold. . . .

3. And if a king's thegn be accused of manslaying, if he dare to clear himself, let him do that with xii king's thegns. If any one accuse that man who is of less degree than the king's thegn, let him clear himself with xi of his equals and with one king's thegn. And so for every suit which may be for more than iv mancuses. And if he dare not, let him pay for it threefold as it may be valued.

From the LAWS OF ATHELSTAN (about 930).

12. And we have ordained that no man buy any property out of port over xx pence; but let him buy there within, on the witness of the portreeve, or of another unlying man; or further on the witness of the reeves at the folkmote.

From the "ORDINANCE OF THE HUNDRED" OF EDGAR (950–975).

4. And we have ordained, concerning unknown cattle; that no one should possess it without the testimonies of the men of the

hundred, or the tithingman, and that he be a well-trusty man; and unless he have either of these, let no vouching to warranty be allowed him.

POLLOCK, ENGLISH LAW BEFORE THE NORMAN CONQUEST, 14 Law Quar. Rev. 291, 292.

The courts were open air meetings of the freemen who were bound to attend them, the suitors as they are called in the terms of Anglo-Norman and later mediæval law; there was no class of professional lawyers; there were no judges in our sense of learned persons especially appointed to preside, expound the law, and cause justice to be done; the only learning available was that of the bishops, abbots, and other great ecclesiastics. This learning, indeed, was all the more available and influential because before the Norman Conquest, there were no separate ecclesiastical courts in England. There were no clerks, nor apparently, any permanent officials of the popular courts; their judgments proceeded from the meeting itself, not from the presiding officer, and were regularly preserved only in the memory of the suitors.

From the SECULAR ORDINANCE OF EDGAR.

Cap. 1. . . . This, then, is first what I will: that every man be worthy of folk right, as well poor as rich; and that righteous dooms be judged to him; and let there be such remission in the bot as may be becoming before God and tolerable before the world.

Cap. 6. And let the hundred gemot be attended as it was before fixed; and thrice in the year let a burh-gemot be held, and twice a shire gemot; and let there be present the bishop of the shire and the ealdorman, and there both expound as well the law of God as the secular law.

Extracts from POLLOCK, ENGLISH LAW BEFORE THE NORMAN CONQUEST, 14 Law Quar. Rev. 291.

Some considerable time before the Norman Conquest, but how long is not known, bishops and other great men had acquired the right of holding courts of their own and taking the profits in the shapes of fines and fees, or what would have been the king's share of the profits. My own belief is that this began very early, but there is no actual proof of it. Twenty years after the conquest, at any rate, we find private jurisdiction constantly mentioned in the Domesday Survey, and common in every part of England;

about the same time, or very shortly afterwards, it was recognized as a main ingredient in the complex and artificial system of feudalism. After having grown in England, as elsewhere, to the point of threatening the king's supremacy, but having happily found in Edward I a master such as it did not find elsewhere before the time of Richelieu, the manorial court is still with us in a form attenuated almost to the point of extinction. . . .

Rigid and cumbrous as Anglo-Saxon justice was in the things it did provide for, it was, to modern eyes, strangely defective in its lack of executive power. Among the most important functions of courts as we know them is compelling the attendance of parties and enforcing the fulfillment both of final judgments and of interlocutory orders dealing with the conduct of proceedings and the like. Such things are done as of course under the ordinary authority of the court. . . . But this reign of law did not come by nature; it has been slowly and laboriously won. Jurisdiction began, it seems, with being merely voluntary, derived not from the authority of the state but from the consent of the parties. People might come to the court for a decision if they agreed to do so. They were bound in honor to accept the result; they might forfeit pledges deposited with the court; but the court could not compel their obedience any more than a tribunal of arbitration appointed at this day under treaty between sovereign states can compel the rulers of those states to fulfill its award. Anglo-Saxon courts had got beyond this most early stage, but not very far beyond it.

The only way to bring an unwilling adversary before the court was to take something of his as security till he would attend the demand;[1] and practically the only things that could be taken without personal violence were cattle. Distress in this form was practiced and also regulated from a very early time. It was forbidden to distrain until right had been formally demanded . . . and refused. Thus leave of court was required, but the party had to

[1] "Among the various modes of terminating the differences between nations by forcible means short of actual war, are the following: 1. By laying an embargo or sequestration on the ships and goods or other property of the offending nation found within the territory of the injured state. 2. By taking forcible possession of the thing in controversy. . . . 3. By exercising the right of vindictive retaliation. . . . 4. By making reprisals upon the persons and things belonging to the offending nation until a satisfactory reparation is made for the alleged injury." Wheaton, International Law, § 290. On distress in archaic legal systems, see Maine, Early History of Institutions, Lects. IX and X.

act for himself as best he could. If distress failed to make the defendant appear, the only resource left was to deny the law's protection to the stiff-necked man who would not come to be judged by law. He might be outlawed, and this must have been strong enough to coerce most men who had anything to lose and were not strong enough to live in rebellion; but still no right could be done to the complainant without his submission. The device of a judgment by default, which is familiar enough to us, was unknown, and probably would not have been understood.

Final judgment, when obtained, could in like manner not be directly enforced. The successful party had to see to gathering the "fruits of judgment," as we say, for himself. In case of continued refusal to do right, he might take the law into his own hands, in fact wage war on his obstinate opponent. The ealdorman's aid, and ultimately the king's, could be invoked in such extreme cases as that of a wealthy man, or one backed by a powerful family, setting the law at open defiance. But this was an extraordinary measure, analogous to nothing in the regular modern process of law.

From the LAWS OF INE (about 690).

Cap. 9. If any one take revenge before he demand justice, let him give up what he has taken to himself and pay (the damage done) and make bot with 30 shillings.

From the LAWS OF CNUT (1016–1035).

Cap. 19. And let no man take any distress, either in the shire or out of the shire before he has thrice demanded his right in the hundred. If at the third time he have no justice, then let him go at the fourth time to the shire-gemot, and let the shire appoint him a fourth term. If that then fail, let him take leave either from hence or thence, that he may seize his own.

From the JUDICIA CIVITATIS LUNDONIAE OF ATHELSTAN (about 930).

Cap. viii. 2. And if it then should happen that any kin be so strong and so great, within land or without land . . . that they refuse us our right, and stand up in defence of a thief, that we all of us ride thereto with the reeve within whose manung it may be.

From the "ORDINANCE OF THE HUNDRED" OF EDGAR.

7. In the hundred, as in any other gemot, we ordain that folk-right be pronounced in every suit, and that a term be fixed when it shall be fulfilled. And he who shall break that term, unless it be by his lord's decree, let him make bot with xxx shillings and on the day fixed fulfill that which he ought to have done before.

3. And the man who neglects this and denies the doom of the hundred, and the same be afterwards proved against him, let him pay to the hundred xxx pence; and for the second time lx pence, half to the hundred, half to the lord. If he do so a third time, let him pay half a pound; for the fourth time, let him forfeit all he owns and be an outlaw, unless the king allow him to remain in the country.

From the LAWS OF ATHELSTAN (about 960).

12. If anyone when thrice summoned fail to attend the gemot, let him pay a penalty to the king, and let it be announced seven days before the gemot is to be. But if he will not do right nor pay the penalty, then let all the chief men belonging to the burh ride to him and take all that he has and put him in pledge. But if anyone will not ride with his fellows, let him pay penalty to the king.

CASE OF EADWINE AGAINST EANWENE, BEFORE THE COUNTY COURT AT AYLTON. Essays in Anglo-Saxon Law, 365 (prior to 1033).

Here is made known in this writing that a shire-gemot sat at Aylton in King Cnut's day. There came Bishop Aethelstan, and Ealdorman Ranig, and Eadwine, (son) of the ealdorman, and Leofwine, son of Sulfsig, and Thurkil White; and Tofig Proud came there on the king's errand; and there was sheriff Bryning, and Aegelweard of Frome, and Leofwine of Frome, and Godwin of Stoke, and all the thanes in Herefordshire. Then came there Eadwine son of Eanwene, faring to the gemot, and made claim against his own mother for a piece of land; namely, Wellington and Cradley. Then asked the bishop who was to answer for his mother; then answered Thurkil White and said that it was his part (to do so), if he knew the case. As he did not know the case, they appointed three thanes from the gemot, and should ride where she was; namely, at Fawley; these were Leofwine of Frome, and Aegelsie the Red, and Winsie Shipman. And when they came to her, then asked they what tale she had about the lands which her son

sued for. Then said she that she had no land that belonged to him in any way, and she was vehemently angry with her son, and called her kinswoman, Leofled, Thurkil's wife, to her, and said to her before them thus: Here sits Leofled, my kinswoman, whom I grant both my land and my gold, both raiment and garment, and all that I own, after my day. And she afterwards said to the thanes: Do thanelike and well. Declare my errand to the gemot before all the good men, and make known to them whom I have granted my land to, and all my property; and to my son nothing whatever; and ask them to be witness to this. And they then did so, rode to the gemot, and made known to all the good men what she had laid on them. Then Thurkil White stood up in the gemot and asked all the thanes to give his wife clear the lands that her kinswoman granted her, and they did so. And Thurkil rode then to Saint Aethelbert's minster, by leave and witness of the whole people, and caused (this) to be recorded in a church book.

GLOSSARY

Bot — Composition. A sum of money paid to an injured person or his kinsmen to buy off the vengeance that would otherwise be sought.

Burh — Borough. Castle. Fortified place.

Burhbryce — Breach of the peace of a castle or fortified house.

Ceorl — Churl. A common free man.

Clear himself — To disprove an accusation by the appointed mode of trial — ordeal or compurgation.

Edor bryce — Breach of an enclosure.

Fah man — Outlaw. One who is not in the peace.

Folk mote — Assembly of the free men in the county court.

Frith — Peace.

Gafol gelda — One who pays tribute.

Gebur — Peasant. A rustic of the lowest free rank.

Gemot — Any temporal (as contrasted with ecclesiastical) court, that is, assembly of the free men.

Hynde — Twelve-hynde man, the rank of a wer of 1200 shillings; six-hyndeman, the rank of a wer of 600 shillings.

Manung — District under the jurisdiction of a reeve.

Wer — The pecuniary estimation of a man, by which the value of his oath and the sum to be paid for his death were determined. A sum paid to the kindred of a person killed, to buy off their vengeance.

Wita — One of the great men of the realm who sits in the great council to advise the king.

Wite — A fine. A payment by way of punishment. A payment to the king to buy off his vengeance for an affront to him.

2. THE DEVELOPMENT OF THE COMMON LAW

(*a*) *The King's Peace* [1]

From the LAWS OF ETHELBERT (600).

Cap. 2. If the king call his people to him and any one there do them evil, let him compensate with a two-fold bot and fifty shillings to the king.

Cap. 3. If the king drink at any one's house, and anyone there do any offense, let him make two-fold bot.

Cap. 5. If a man kill another in the king's mansion, let him make bot with 50 shillings.

Cap. 8. The fine for breach of the king's protection 50 shillings.

Cap. 13. If a man slay another in an eorl's enclosure, let him make bot with 12 shillings.

Cap. 15. The fine for breach of an eorl's protection 6 shillings.

Cap. 17. If anyone be the first to make an inroad into a man's enclosure, let him make bot with 6 shillings; let him who follows, with 3 shillings; after, each a shilling.

From the LAWS OF WIHTRAED (Kent about 700).

Cap. 2. That the fine for breach of the protection of the church be 50 shillings, the same as the king's.

From the LAWS OF INE (about 690).

Cap. 6. If anyone fight in the king's house, let him be liable in all his property, and be it in the king's doom whether he shall or shall not have life. If any one fight in a minster, let him make bot with one hundred and twenty shillings. If any one fight in an ealdorman's house, or in any other distinguished wita's, let him make bot with LX shillings, and pay a second LX shillings as wite. But if he fight in a gafol-gelda's house, or in a gebur's, let him pay CXX shillings as wite and to the gebur VI shillings. And though it be fought on mid-field, let one hundred and twenty shillings be given as wite. But if they have altercation at a feast, and one of them bear it with patience let the other give XXX shillings as wite.

From the LAWS OF ALFRED.

Cap. 5. We also ordain to every church which has been hallowed by a bishop, this frith; if a fah-man flee to or reach one, that for

[1] See Howard, The King's Peace and the Local Peace Magistracy.

seven days no one drag him out. But if any one do so, then let him be liable in the king's fine for breach of his protection and the church-frith; more if he there commit more wrong, if, despite of hunger, he can live; unless he fight his way out. If the brethren have further need of their church, let them keep him in another house, and let not that have more doors than the church. Let the church-ealdor take care that during this term no one give him food.[1] If he himself be willing to deliver up his weapons to his foes, let them keep him xxx days, and let them give notice of him to his kinsmen. It is also church-frith; if any man seek a church for any of those offenses, which had not been before revealed, and there confess himself in God's name, be it held forgiven. He who steals on Sunday, and at Yule, or at Easter, or on Holy Thursday, and on Rogation days; for each of these we will that the bot be two-fold, as during Lent-fast.

Cap. 7. If a man fight in the king's hall or draw his weapon and he be taken; be it in the king's doom, either death, or life, as he may be willing to grant him. If he escape, and be taken again, let him pay for himself according to his wer-gild, and make bot for the offense, as well wer as wite, according as he may have wrought.

Cap. 15. If a man fight before an archbishop or draw his weapon, let him make bot with one hundred and fifty shillings. If before another bishop or an ealdorman this happens, let him make bot with one hundred shillings.

Cap. 38. If any man fight before the king's ealdorman in the gemot, let him make bot with wer and wite as it may be right; and before this cxx shillings to the ealdorman as wite. If he disturb the folkmote by drawing his weapon, cxx shillings to the ealdorman as wite. If aught of this happen before a king's ealdorman's junior, or a king's priest, xxx shillings as wite.

Cap. 40. The king's burh-bryce shall be cxx shillings. An archbishop's ninety shillings. Any other bishop's, and an ealdorman's, ix shillings. A twelve-hynde man's, xxx shillings. A six-hynde man's, xv shillings. A ceorl's edor-bryce, v shillings. If aught of this happen when the fyrd is out, or in Lent fast, let the bot be two-fold. If anyone in Lent put down holy law among the people without leave, let him make bot with cxx shillings.

[1] See Decree of the Emperor Henry IV Concerning a Truce of God (1085). Henderson, Historical Documents of the Middle Ages, 208.

From the LAWS OF ETHELRED (978–1016).

II. Cap. 6. If the frith breach be committed within a burh, let the inhabitants of the burh themselves go and get the murderers living or dead, or their nearest kindred, head for head. If they will not, let the ealdorman go; if he will not, let the king go; if he will not, let the ealdordom lie in unfrith.

From the SECULAR DOOMS OF CNUT.

Cap. 83. And I will that every man be entitled to immunity from molestation to the gemot and from the gemot, except he be a notorious thief.

From the LAWS OF ETHELRED.

VI. Cap. 13. Be every church in the peace of God and of the king, and of all Christian folk.

From the LEGES EDWARDI CONFESSORIS (1043–1066. But these so-called laws of Edward the Confessor were "ascertained" in the next century).

12. The peace of the king is of many kinds. One given by his own hand, which the English call kinges hand sealde grith. Another of the day on which first he was crowned. This last eight days. At the birth of our Lord, eight days, and eight at Easter. and eight at Whitsunday. Another is given by its special writ. Another which the four highways have; namely, Watlingstrete, Fosse, Hikenildstrete, Ermingstrete, of which two stretch out in the length of the kingdom and two in the breadth. Another which the waters have, by the navigation on which, from various places, food is brought to the cities and boroughs. This peace, however, of his own hand, of the days of his coronation, and of the writ, is under the law of one penalty. In like manner the four highways and the great waters in regard to attack. But if any work be built let it be destroyed and a half be given as a recompense. Whoever has broken the peace in the eighteen hundreds of the Danelag, his body also is at the mercy of the king, by the law of England his wer, that is his price, and the recompense for the slaying of those slain he shall pay to the lords of those slain. The recompense for slaying a serf or bondman in the Danelag is twelve ora; in the case of freemen, three marks. By the English law to the king or archbishop, three marks for their men; to a bishop of the shire, to a nobleman of the shire, or to the steward of the king, twenty soli-

darii; to the other barons, ten solidarii. Let him make restitution to the parents or prepare for war. Whence the English had a saying: *Bicge spere of side other bere*, which means, either buy from them that the spear be covered up, or bear it. But let the peace of the four highways and of the great waters, placed in the greater judgment of penalties which we have above mentioned, be held for assault. And if mills, fisheries or any other things whatever be prepared for destroying the freedom of them, let these things be destroyed, the roads and waterways repaired and a recompense to the king shall not be forgotten. Other roads from city to city, from borough to borough, by which men travel for selling their wares or other business of their own, are under the law of the shire. And if anything be built for their disturbance, let it be pulled down to the ground and the ways repaired, and according to the law of the shire, to the sheriff and his lieutenant let restitution be made. In like manner in regard to smaller navigable streams with those things that are necessary to cities and boroughs, namely, woods and the rest. They shall be under the law of the smaller roads in regard to penalties.

From the STATUTES OF WILLIAM THE CONQUEROR. (Henderson's translation.)

3. And I will moreover that all men whom I have brought with me, or who have come after me, shall be in my peace and quiet. And if one of them shall be slain, the lord of the murderer shall seize him within five days if he can; but if not, he shall begin to pay me forty-six marks of silver so long as his possessions shall hold out. But when the possessions of the lord of that man are at an end, the whole hundred in which the slaying took place shall pay in common what remains.

Extracts from POLLOCK, THE KING'S PEACE, Oxford Lectures, 65.

First, only the four roads are the king's; then every common road which leads to the king's city, borough, castle or haven; and as most roads of any importance must, sooner or later, answer this description if followed far enough, the king's highway came to be, as it now is, merely a formal or picturesque name for any public road whatever. As late as the fourteenth century, however, it was an opinion still held by some that not every common road was royal, insomuch that the soil and freehold of a common road could be vested in an individual owner only if it was not *via regia*. The

very survival of the term "the king's highway" shows that the idea of peculiar legal sanctity clung about highways in popular imagination long after they had ceased to be more under the king's peace than any other English ground. . . .

After the Conquest, then, the various forms in which the king's special protection had been given disappear, or rather merge in his general protection and authority, for the details that occur in the compilations bearing the names of Henry the First and Edward the Confessor, welcome as they are by way of supplement to earlier documents, are mere echoes of traditions no longer living. The king's peace is proclaimed in general terms at his accession. But, though generalized in its application, it still was subject to a strange and inconvenient limit in time. The fiction that the king is everywhere present, though not formulated, was tacitly adopted; the protection once confined to his household was extended to the whole kingdom. The fiction that the King never dies was yet to come. It was not the peace of the Crown, and authority having continuous and perpetual succession, that was proclaimed, but the peace of William or Henry. When William or Henry died, all authorities derived from him were determined or suspended; and among other consequences, his peace died with him. What this abeyance of the king's peace practically meant is best told in the words of the Chronicle, which says upon the death of Henry I (anno 1135): "Then there was tribulation soon in the land, for every man that could forthwith robbed another." Order was taken in this matter (as our English fashion is) only when the inconvenience became flagrant in a particular case. At the time of Henry III's death his son Edward was in Palestine. It was intolerable that there should be no way of enforcing the king's peace till the king had come back to be crowned: and the great men of the realm, by a wise audacity, took upon them to issue a proclamation of the new king's name forthwith. This good precedent being once made, the doctrine of the king's peace being in suspense was never afterwards heard of. . . .

We said that the king's peace and protection had become the established right of every peaceable subject. Nevertheless a trace of the archaic ideas persisted as long as the art of common law pleading itself. The right was to be enjoyed only on condition of being formally demanded. In order to give the king's courts jurisdiction of a plea of trespass it was needful to insert in the writ the words *vi et armis*, which imported a breach of the peace; and it

was usual, if not necessary, also to add expressly the words *contra pacem nostram.* Without the allegation of force and arms the writ was merely "vicountiel," that is, the sheriff did not return it to the Superior Court but had to determine the matter in the County Court. By so many steps and transformations did it become possible for Lambarde and Blackstone after him, to say, with unconscious inversion of the historical order of development, and as if the matter were in itself too obvious to need explanation: "The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the king's peace."

(*b*) *The King's Writ*

When the king was applied to for justice, or desired to vindicate his authority, he issued his writ to the sheriff or some other suitable person directing what was to be done. In ancient times executive and judicial functions were not distinguished. The king's writ was used for all purposes connected with the business of administration, the writs in judicial proceedings orginally being in no way different from those in purely administrative affairs. Gradually a regular set of writs for judicial proceedings grew up, which in time became fixed in form and determined the scope and course of relief in the king's courts.

ABBOT OF ST. EDMUND v. ABBOT OF PETERBOROUGH (reign of William I). (Translated from Bigelow, Placita Anglo-Normannica, 32.)

William King of England to the Abbot of Peterborough, Greeting: I command and require you that you permit the Abbot of St. Edmund to receive sufficient stone for his church, as he has had hitherto, and that you cause him no more hindrance in drawing stone to the water, as you have heretofore done. Witness the Bishop of Durham.

THE ABBOT OF ABINGDON v. MEN OF STANTON (1105 or 1107). (Translated from Bigelow, Placita Anglo-Normannica, 89.)

Henry, King of England, to Nigel of Oilly and William Sheriff of Oxford, Greeting. I command you that you do full right to the Abbot of Abingdon concerning his sluice which the men of Stanton broke, and so that I hear no more complaint thereof for defect of right, and this under penalty of ten pounds. Witness Ralph the Chancellor, at Westminster.

ABBOT FARITIUS v. JORDAN DE SACKVILLE (about 1108). (Translated from Bigelow, Placita Anglo-Normannica, 99.)

Henry King of England to Jordan de Sackville, Greeting. I command you to do full right to Abbot Faritius and the church of Abingdon concerning the land which you took from them, which Ralph of Cainesham gave to the church in alms; and unless you do this without delay, I command that Walter Giffard do it, and if he shall not have done it, that Hugh of Bocheland do it, that I may hear no complaint thereof for defect of right.

GLANVILL, TREATISE ON THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND (between 1187 and 1189). (Beames's translation.)

Book I, chap. V. When any one complains to the king, or his justices, concerning his Fee, or his Freehold, if the complaint be such as be proper for the determination of the King's Court, or the King is pleased that it should be decided there, then the party complaining shall have the following writ of summons.

Chap. VI. The King to the Sheriff, Health. Command A that, without delay, he render to B one hyde of land, in such a vill, of which the said B complains that the aforesaid A hath deforced him; and unless he does so, summon him by good summoners, that he be there, before me or my Justices, *in crastino post octabas clausi Paschae* at such a place, to show wherefore he has failed; and have there the summoners and this writ.

[He then sets forth and explains some twelve other writs issued in the king's name, marking various stages in the litigation, ending with the following:]

Chap. XX. The King to the Sheriff, Health. I command you that without delay, you deliver possession to N of one hyde of land, in such a vill, which he claims against R of which the said R put himself upon my assise, because the said N has recovered that land in my Court by a recognition.

BLACKSTONE, COMMENTARIES, III, 272.

First, then of the original, or original writ: which is the beginning or foundation of the suit. When a person hath received an injury, and thinks it worth his while to demand a satisfaction for it, he is to consider with himself, or take advice, what redress the law has given for that injury; and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. As,

for money due on bond, an action of debt; for goods detained without force, an action of detinue or trover; or, if taken with force, an action of trespass *vi et armis;* or to try the title of lands, a writ of entry, or action of trespass in ejectment; or for any consequential injury received, a special action on the case. To this end he is to sue out, or purchase by paying the stated fees, an original, or original writ, from the court of chancery, which is the *officina justitiae*, the shop or mint of justice, wherein all the king's writs are framed. It is a mandatory letter from the king, on parchment, sealed with his great seal, and directed to the sheriff of the county where injury is committed, or supposed to be committed, requiring him to command the wrong-doer or party accused either to do justice to the complainant or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ, he must return or certify to the court of common pleas, together with the writ itself; which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause. For it was a maxim introduced by the Normans, that there should be no proceedings in common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the crown, should take cognizance of anything but what was thus expressly referred to their judgment. However, in small actions below the value of forty shillings, which are brought in the court baron or county court, no royal writ is necessary; but the foundation of such suits continues to be (as in the times of the Saxons) not by original writ, but by plaint; that is, by a private memorial tendered in open court to the judge; wherein the party injured sets forth his cause of action; and the judge is bound of common right to administer justice therein, without any special mandate from the king. Now, indeed, even the royal writs are held to be demandable of common right, on paying the usual fees; for any delay in the granting them, or setting an unusual or exorbitant price upon them, would be a breach of magna carta c. 29, "*nulli vendemus, nulli negabimus aut differemus, justitiam vel rectum.*"

(*c*) *State Law and Church Law*

Extracts from MAITLAND, PROLOGUE TO A HISTORY OF ENGLISH LAW, 14 Law Quar. Rev. 13, 14, 20, 26.

In the year 200 six centuries and a half of definite legal history, if we measure only from the Twelve Tables, were consciously

summed up in the living and growing body of the law. Dangers lay ahead. We notice one in a humble quarter. Certain religious societies, congregations (ecclesiae) of non-conformists, have been developing law, internal law, with ominous rapidity. We have called it law, and law it was going to be; but as yet it was, if the phrase be tolerable, unlawful law, for these societies had an illegal, if not a criminal purpose. Spasmodically the imperial law was enforced against them; at other times the utmost that they could hope for from the state was that in the guise of "benefit and burial societies" they would obtain some protection for their communal property. But internally they were developing what was going to be a system of constitutional and governmental law, which would endow the overseer (episcopus) of every congregation with manifold powers. Also they were developing a system of punitive law, for the offender might be excluded from all participation in religious rites, if not from worldly intercourse with the faithful. Moreover, these various communities were becoming united by bonds that were too close to be federal. In particular, that one of them which had its seat in the capital city of the empire was winning a preëminence for itself and its overseer.

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About the year 500 there was in Rome a monk of Scythian birth who was laboring upon the foundations of the *Corpus Iuris Canonici*. He called himself Dionysius Exiguus. He was an expert chronologist and constructed the Dionysian cycle. He was collecting and translating the canons of eastern councils; he was collecting also some of the letters (decretal letters they will be called) that had been issued by the popes from Sircius onwards (384–498). This *Collectio Dionysiana* made its way in the West. Some version of it may have been the book of canons which our Archbishop Theodore produced at the council of Hertford in 673. A version of it (*Dionysio-Hadriana*) was sent by Pope Hadrian to Charles the Great in 774. It helped to spread abroad the notion that the popes can declare, even if they cannot make, law for the universal church, and thus to contract the sphere of secular jurisprudence.

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Slowly and by obscure processes a great mass of ecclesiastical law had been forming itself. It rolled, if we may so speak, from country to country and took up new matter into itself as it went,

for bishop borrowed from bishop and transcriber from transcriber. Oriental, African, Spanish, Gallican canons were collected into the same book, and the decretal letters of later were added to those of earlier popes. Of the Dionysiana we have already spoken. Another celebrated collection seems to have taken shape in the Spain of the seventh century; it has been known as the *Hispana* or *Isidoriana*, for without sufficient warrant it has been attributed to that St. Isidore of Seville (ob. 636), whose *Origines* served as an encyclopædia of jurisprudence and all other sciences. The *Hispana* made its way into France, and it seems to have already comprised some spurious documents before it came to the hands of the most illustrious of all forgers.

Then out of the depth of the ninth century emerged a book which was to give law to mankind for a long time to come. Its core was the *Hispana;* but into it there had been foisted, besides other forgeries, some sixty decretals professing to come from the very earliest successors of St. Peter. The compiler called himself Isidorus Mercator; he seems to have tried to personate Isidore of Seville. Many guesses have been made as to his name and time and home. It seems certain that he did his work in Frankland and near the middle of the ninth century. He has been sought as far west as le Mans, but suspicion hangs thickest over the church of Reims. The false decretals are elaborate mosaics made up out of phrases from the bible, the fathers, genuine canons, genuine decretals, the West Goth's Roman law-book; but all these materials wherever collected, are so arranged as to establish a few great principles: the grandeur and superhuman origin of ecclesiastical power, the sacro-sanctity of the persons and the property of bishops, and, though this is not so prominent, the supremacy of the bishop of Rome. Episcopal rights are to be maintained against the *chorepiscopi*, against the metropolitans, and against the secular power. Above all (and this is the burden of the song), no accusation can be brought against a bishop so long as he is despoiled of his see: *Spoliatus episcopus ante omnia debet restitui.* . . . The Isidorian forgeries were soon accepted at Rome. The popes profited by documents which taught that ever since the apostolic age the bishops of Rome had been declaring, or even making, law for the universal church. On this rock or on this sand a lofty edifice was reared.

And now for the greater part of the Continent comes the time when ecclesiatical law is the only sort of law that is visibly growing.

The stream of capitularies ceased to flow; there was none to legislate; the Frankish monarchy was going to wreck and ruin; feudalism was triumphant. Sacerdotalism also was triumphant, and its victories were closely connected with those of feudalism. The clergy had long been striving to place themselves beyond the reach of the state's tribunals. The dramatic struggle between Henry II and Becket has a long Frankish prologue. Some concessions had been won from the Merovingians; but still Charles the Great had been supreme over all persons and in all causes. Though his realm fell asunder, the churches were united, and united by a principle that claimed a divine origin. They were rapidly evolving law which was in course of time to be the written law of an universal and theocratic monarchy. The mass, now swollen by the Isidorian forgeries, still rolled from diocese to diocese, taking up new matter into itself. It became always more lawyerly in form and texture as it appropriated sentences from the Roman law-books and made itself the law of the only courts to which the clergy would yield obedience. Nor was it above borrowing from Germanic law, for thence it took its probative processes, the oath with oath-helpers and the ordeal or judgment of God. Among the many compilers of manuals of church law three are especially famous: Regino, abbot of Prüm (906–915); Burchard, bishop of Worms (1012–1023); and Ivo, bishop of Chartres (ob. 1117). They and many others prepared the way for Gratian, the maker of the church's Digest, and events were deciding that the church should also have a Code and abundant Novels. In an evil day for themselves the German kings took the papacy from the mire into which it had fallen, and soon the work of issuing decretals was resumed with new vigor. At the date of the Norman Conquest the flow of these edicts was becoming rapid.

BURN, ECCLESIASTICAL LAW, II, 31–34.

1. For the first 300 years after Christ, the distinction of ecclesiastical or spiritual causes, in point of jurisdiction, did not begin; for at that time no such distinction was heard of in the Christian world; for the causes of testaments, matrimony, bastardy, adultery, and the rest, which are called ecclesiastical or spiritual causes, were merely civil, and determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate. But after the emperors were become Christian, out of a zeal and desire they had to grace and honor the learned and godly bishops of that time,

they were pleased to single out certain special causes, wherein they granted jurisdiction to bishops; namely, in cases of tithes, because paid to men of the church; in causes of matrimony, because marriages were for the most part solemnized in the church; in causes testamentary, because testaments were many times made *in extremis*, when churchmen were present giving spiritual comfort to the testator, and therefore they were thought the fittest persons to take the probates of such testaments: and so of the rest. Yet these bishops did not then proceed in these causes according to the canons and decrees of the church (for the canon law was not then made), but according to the rules of the imperial law, and as the civil magistrate proceeded in other causes.

2. Accordingly, in this kingdom, in the Saxon times, before the Norman Conquest, there was no distinction of jurisdictions; but all matters, as well spiritual as temporal, were determined in the county court, called the sheriff's tourn, where the bishop and earl (or in his absence the sheriff) sat together; or else in the hundred court, which was held in like manner before the lord of the hundred and ecclesiastical judge.

For the ecclesiastical officers took their limits of jurisdiction from a like extent of the civil powers. Most of the old Saxon bishoprics were of equal bounds with the distinct kingdoms. The archdeaconries, when first settled into local districts, were commonly fitted to the respective counties. And rural deanries, before the Conquest, were correspondent to the political tithings. Their spiritual courts were held with a like reference to the administration of civil justice. The synods of each province and diocese were held at the discretion of the metropolitan and the bishop, as great councils at the pleasure of the prince. The visitations were first united to the civil inquisitions in each county; and afterwards, when the courts of the earl and bishop were separated, yet still the visitations were held like the sheriff's tourns, twice a year, and like them too, after Easter and Michaelmas, and still with nearer likeness the greater of them was at Easter. The rural chapters were also held like the inferior courts of the hundred, every three weeks; then, and like them too, they were changed into monthly, and at last into quarterly meetings. Nay, and a prime visitation was held commonly, like the prime folcmote or sheriff's tourn, on the very calends of May.

And accordingly Sir Henry Spelman observes, that the bishop and the earl sat together in one court, and heard jointly the causes

of church and commonwealth; as they yet do in parliament. And as the bishop had twice in the year two general synods, wherein all the clergy of his diocese of all sorts were bound to resort for matters concerning the church; so also there was twice in the year a general assembly of all the shire for matters concerning the commonwealth, wherein without exception all kinds of estates were required to be present; dukes, earls, barons, and so downward of the laity; and especially the bishop of that diocese among the clergy. For in those days the temporal lords did often sit in synods with the bishops, and the bishops in like manner in the course of the temporalty, and were therein not only necessary, but the principal judges themselves. Thus by the laws of King Canutus, "the shyre-gemot (for so the Saxons called this assembly of the whole shire) shall be kept twice a year and oftener if need require, wherein the bishop and the alderman of the shire shall be present, the one to teach the laws of God, the other the law of the land." And among the laws of King Henry I it is ordained, "first, let the laws of true Christianity (which we call the ecclesiastical) be fully executed with due satisfaction; then let the pleas concerning the king bedealt with; and lastly, those between party and party: and whomsoever the church synod shall find at variance, let them either make accord between them in love, or sequester them by their sentence of excommunication." Whereby it appeareth, that ecclesiastical causes were at that time under the cognizance of this court. But these, he says, he takes to be such ecclesiatiscal causes as were grounded upon the ecclesiastical laws made by the kings themselves for the government of the church (for many such there were in almost every king's reign), and not for matters rising out of the Roman canons, which haply were determinable only before the bishop and his ministers. And the bishop first gave a solemn charge to the people touching ecclesiastical matters, opening unto them the rights and reverence of the church, and their duty therein towards God and the king, according to the word of God. Then the alderman in like manner related unto them the laws of the land, and their duty towards God, the king and commonwealth, according to the rule and tenure thereof.

3. The separation of the ecclesiastical from the temporal courts was made by William the Conqueror.[1] And as from thence we are to

[1] But see Lichtenstein, The Date of Separation of Ecclesiastical and Lay Jurisdiction in England, 3 Ill. Law Rev. 347.

date this great alteration in our constitution, it is judged necessary to recite the charter of separation verbatim; which is as followeth:[1]

"William, by the grace of God, King of the English, to R. Bainard and G. de Magnavilla, and P. de Valoines, and to my other faithful ones of Essex and of Hertfordshire and of Middlesex, Greeting. Know all of you and my other faithful ones who remain in England, that in a common council and by the advice of the archbishops and bishops, and abbots, and of all the princes of my kingdom, I have decided that the episcopal laws, which up to my time in the kingdom of the English have not been right or according to the precepts of the holy canons, shall be emended. Wherefore I command, and by royal authority decree, that no bishop or archdeacon shall any longer hold, in the hundred court, pleas pertaining to the episcopal laws, nor shall they bring before the judgment of secular men any case which pertains to the rule of souls; but whoever shall be summoned, according to the episcopal laws, in any case or for any fault, shall come to the place which the bishop shall choose or name for this purpose, and shall there answer in his case or for his fault, and shall perform his law before God and his bishop not according to the hundred court, but according to the canons and the episcopal laws. But if any one, elated by pride, shall scorn or be unwilling to come before the judgment seat of the bishop, he shall be summoned once and a second and a third time; and if not even then he come to make amends, he shall be excommunicated; and, if it be needful to give effect to this, the power and justice of the king or the sheriff shall be called in. But he who was summoned before the judgment seat of the bishop shall, for each summons, pay the episcopal fine. This also I forbid and by my authority interdict, that any sheriff, or prevost, or minister of the king, or any layman concern himself in the matter of laws which pertain to the bishop, nor shall any layman summon another man to judgment apart from the jurisdiction of the bishop. But judgment shall be passed in no place except within the episcopal see, or in such place as the bishop shall fix upon for this purpose."

This charter, Mr. Selden says, was recited in a close roll of King Richard II, and then confirmed.

CONSTITUTIONS OF CLARENDON (1164), Henderson's translation.

In the year 1164 from the Incarnation of our Lord, in the fourth year of the papacy of Alexander, in the tenth year of the most illus-

[1] I have substituted Henderson's translation here for the original Latin.

trious king of the English, Henry II, in the presence of that same king, this memorandum or inquest was made of some part of the customs and liberties and dignities of his predecessors, viz., of King Henry his grandfather and others, which ought to be observed and kept in the kingdom. And on account of the dissensions and discords which had arisen between the clergy and the Justices of the lord king, and the barons of the kingdom, concerning the customs and dignities, this inquest was made in the presence of the archbishops and bishops, and clergy and counts, and barons and chiefs of the kingdom. . . .

A certain part, moreover, of the customs and dignities of the kingdom which were examined into, is contained in the present writing. Of which part these are the paragraphs:

1. If a controversy concerning advowson and presentation of churches arise between laymen, or between laymen and clerks, or between clerks, it shall be treated of and terminated in the court of the lord king.

. . . . . .

3. Clerks charged and accused of anything, being summoned by the Justice of the king, shall come into his court, about to respond there for what it seems to the king's court that he should respond there; and in the ecclesiastical court for what it seems he should respond there; so that the Justice of the king shall send to the court of the holy church to see in what manner the affair will there be carried on. And if the clerk shall be convicted, or shall confess, the church ought not to protect him further.

. . . . . .

5. The excommunicated shall not give a pledge as a permanency' nor take an oath, but only a pledge and surety of presenting themselves before the tribunal of the church, that they may be absolved.

6. Laymen ought not to be accused unless through reliable and legal accusers and witnesses in the presence of the bishop, in such wise that the archdean do not lose his right, nor any thing which he ought to have from it. And if those who are inculpated are such that no one wishes or dares to accuse them, the sheriff, being requested by the bishop, shall cause twelve lawful men of the neighborhood or town to swear in the presence of the bishop, that they will make manifest the truth in this matter, according to their conscience.

7. No one who holds of the king in chief, and no one of his demesne servitors, shall be excommunicated, nor shall the lands of any one of them be placed under an interdict, unless first the lord king, if he be in the land, or his Justice, if he be without the kingdom, be asked to do justice concerning him: and in such way that what shall pertain to the king's court shall there be terminated; and with regard to that which concerns the ecclesiastical court, he shall be sent thither in order that it may there be treated of.

8. Concerning appeals, if they shall arise, from the archdean they shall proceed to the bishop, from the bishop to the archbishop. And if the archbishop shall fail to render justice, they must come finally to the lord king, in order that by his command the controversy may be terminated in the court of the archbishop, so that it shall not proceed further without the consent of the lord king.

9. If a quarrel arise between a clerk and a layman or between a layman and a clerk concerning any tenement which the clerk wishes to attach to the church property, but the layman to a lay fee: by the inquest of twelve lawful men, through the judgment of the chief Justice of the king, it shall be determined, in the presence of the Justice himself whether the tenement belongs to the church property, or to the lay fee. And if it be recognized as belonging to the church property, the case shall be pleaded in the ecclesiastical court; but if to the lay fee, unless both are holders from the same bishop or baron, the case shall be pleaded in his court; in such way that, on account of the inquest made, he who was first in possession shall not lose his seisin, until, through the pleading, the case shall have been proven.

10. Whoever shall belong to the city or castle or fortress or demesne manor of the lord king, if he be summoned by the archdean or bishop for any offense for which he ought to respond to them, and he be unwilling to answer their summonses, it is perfectly right to place him under the interdict; but he ought not to be excommunicated until the chief servitor of the lord king of that town shall be asked to compel him by law to answer the summonses. And if the servitor of the king be negligent in this matter, he himself shall be at the mercy of the lord king, and the bishop may thenceforth visit the man who was accused with ecclesiastical justice.

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13. If any of the nobles of the kingdom shall have dispossessed an archbishop or bishop or archdean, the lord king should compel them personally, or through their families, to do justice. And if

by chance any one shall have dispossessed the lord king of his right, the archbishops and bishops and archdeans ought to compel him to render satisfaction to the lord king.

14. A church or cemetery shall not, contrary to the king's justice, detain the chattels of those who are under penalty of forfeiture to the king, for they (the chattels) are the king's, whether they are found within the churches or without them.

15. Pleas concerning debts which are due through the giving of a bond, or without the giving of a bond, shall be in the jurisdiction of the king.

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Moreover, a record of the aforesaid royal customs and dignities has been made by the aforesaid archbishops and bishops, and counts and barons, and nobles and elders of the kingdom, at Clarendon on the fourth day before the Purification of the blessed Mary the perpetual Virgin; the lord Henry being there present with his father the lord king. There are, moreover, many other and great customs and dignities of the holy mother church, and of the lord king, and of the barons of the kingdom, which are not contained in this writ. And may they be preserved to the holy church, and to the lord king, and to his heirs, and to the barons of the kingdom, and may they be inviolably observed for ever.

CAUDREY'S CASE, KING'S BENCH (1591), 5 Rep. 1*a*, 8*b*–9*b*.

And therefore by the ancient laws of this realm, this kingdom of England is an absolute empire and monarchy consisting of one head, which is the King, and of a body politic, compact and compounded of many, and almost infinite several, and yet well agreeing members: all which the law divideth into two several parts, that is to say, "the clergy and the laity," both of them, next and immediately under God, subject and obedient to the head: also the kingly head of this politic body is instituted and furnished with plenary and entire power, prerogative and jurisdiction, to render justice and right to every part and member of this body, of what estate, degree, or calling soever in all causes ecclesiastical or temporal, otherwise he should not be a head of the whole body. And as in temporal causes, the King, by the mouth of the Judges in his courts of Justice, doth judge and determine the same by the temporal laws of England: so in causes ecclesiastical and spiritual, as namely, blasphemy, apostasy from Christianity, heresies, schisms, ordering admissions, institutions of clerks, celebration of divine service,

rights of matrimony, divorces, general bastardy, subtraction and right of tithes, oblations, obventions, dilapidations, reparation of churches, probates of testaments, administrations and accounts upon the same, simony, incests, fornications, adulteries, solicitation of chastity, pensions, procurations, appeals in ecclesiastical causes, commutation of penance, and others, (the conusance whereof belongs not to the common laws of England,) the same are to be determined and decided by ecclesiastical Judges, according to the King's ecclesiastical laws of this realm: for as the Romans fetching divers laws from Athens, yet being approved and allowed by the estate there, called them notwithstanding Jus civile Romanorum: and as the Normans borrowing all or most of their laws from England, yet baptized them by the name of the laws or customs of Normandy: so albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by and with a general consent, are aptly and rightly called, the King's Ecclesiastical Laws of England, which whosoever shall deny, he denieth that the King hath full and plenary power to deliver justice in all causes to all his subjects, or to punish all crimes and offenses within his kingdom: for that as before it appeareth the deciding of matters so many, and of so great importance, are not within the conusance of the common laws, and consequently that the King is no complete monarch, nor head, of the whole and entire body of the realm. [Lord Coke here is reporting the "resolutions" of the Judges of England.]

STATUTES OF 1857, ABOLISHING THE CIVIL JURISDICTION OF THE ECCLESIASTICAL COURTS.

An Act to amend the Law relating to Probates and Letters of Administration in England. (25th August 1857.)

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III. The voluntary and contentious Jurisdiction and Authority of all Ecclesiastical, Royal Peculiar, Peculiar, Manorial, and other Courts and Persons in England, now having Jurisdiction or Authority to grant or revoke Probate of Wills or Letters of Administration of the Effects of deceased Persons, shall in respect of such Matters absolutely cease; and no Jurisdiction or Authority in relation to any Matters or Causes Testamentary, or to any Matter arising out of or connected with the Grant or Revocation of Probate or Administration, shall belong to or be exercised by any such Court or Person.

IV. The voluntary and contentious Jurisdiction and Authority in relation to the granting or revoking Probate of Wills and Letters of Administration of the Effects of deceased Persons now vested in or which can be exercised by any Court or Person in England, together with full Authority to hear and determine all Questions relating to Matters and Causes Testamentary, shall belong to and be vested, in Her Majesty, and shall, except as hereinafter is mentioned, be exercised in the Name of Her Majesty in a Court to be called the Court of Probate, and to hold its ordinary Sittings and to have its Principal Registry at such Place or Places in London or Middlesex as Her Majesty in Council shall from Time to Time appoint.

V. There shall be One Judge of Her Majesty's Court of Probate; and it shall be lawful for Her Majesty from Time to Time, by Letters Patent under the Great Seal of the United Kingdom, to appoint a Person, being or having been an Advocate of Ten Years Standing, or a Barrister-at-Law of Fifteen Years Standing, to be such Judge.

An Act to amend the Law relating to Divorce and Matrimonial Causes in England. (28th August 1857.)

Whereas it is expedient to amend the Law relating to Divorce, and to constitute a Court with exclusive Jurisdiction in Matters Matrimonial in England, and with Authority in certain Cases to decree the Dissolution of a Marriage: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

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II. As soon as this Act shall come into operation, all Jurisdiction now exerciseable by any Ecclesiastical Court in England in respect of Divorces *a Mensâ et Thoro*, Suits of Nullity of Marriage, Suits of Jactitation of Marriage, Suits for Restitution of Conjugal Rights, and in all Causes, Suits, and Matters Matrimonial, shall cease to be so exerciseable, except so far as relates to the granting of Marriage Licenses, which may be granted as if this Act had not been passed.

III. Any Decree or Order of any Ecclesiastical Court of competent Jurisdiction which shall have been made before this Act comes into operation, in any Cause or Matter Matrimonial, may be enforced or otherwise dealt with by the Court for Divorce and Matrimonial Causes hereinafter mentioned, in the same Way as if it had been originally made by the said Court under this Act.

IV. All Suits and Proceedings in Causes and Matters Matrimonial which at the Time when this Act comes into operation shall be pending in any Ecclesiastical Court in England shall be transferred to, dealt with, and decided by the said Court for Divorce and Matrimonial Causes as if the same had been originally instituted in the said Court.

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VI. As soon as this Act shall come into operation, all Jurisdiction now vested in or exerciseable by any Ecclesiastical Court or Person in England in respect of Divorces *a Mensâ et Thoro*, Suits of Nullity of Marriage, Suits for Restitution of Conjugal Rights, or Jactitation of Marriage, and in all Causes, Suits, and Matters Matrimonial, except in respect of Marriage Licenses, shall belong to and be vested in Her Majesty, and such Jurisdiction, together with the Jurisdiction conferred by this Act, shall be exercised in the Name of Her Majesty in a Court of Record to be called "The Court for Divorce and Matrimonial Causes."

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VIII. The Lord Chancellor, the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the Senior Puisne Judge for the Time being in each of the Three last-mentioned Courts, and the Judge of Her Majesty's Court of Probate constituted by any Act of the present Session, shall be the Judges of the said Court.

IX. The Judge of the Court of Probate shall be called the Judge Ordinary of the said Court, and shall have full Authority, either alone or with One or more of the other Judges of the said Court, to hear and determine all Matters arising therein, except Petitions for the dissolving of or annulling Marriage, and Applications for new Trials of Questions or Issues before a Jury, Bills of Exception, Special Verdicts, and Special Cases, and, except as aforesaid, may exercise all the Powers and Authority of the said Court.

NIBOYET v. NIBOYET, COURT OF APPEAL, 1878 (1 P. D. 1, 4–7).

James, L. J.: Can there be any doubt that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the church and her Courts to the sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce *a mensâ et thoro*, and in either case for

proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicil in the sense of the secular domicil, viz., the domicil affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or in itinere, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavor to solve, what has been found so often very difficult of solution, the question of a person's domicil. If a Frenchman came to reside in an English parish his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offense to be dealt with by the ordinary, *pro salute animae.* It is not immaterial to note that dioceses, and states or provinces, were not necessarily conterminous. The Channel Islands, which are no part of England, are in the diocese of Winchester, and the Isle of Man is in the province of York; and many similar cases might be found on the Continent. And although the laws of the state sometimes interfered by way of coercion, regulation, or prohibition, with the Courts Christian, the latter acted *proprio vigore,* and they administered their own law, not the law of the state, and they administered it in their own name and not in the name of the sovereign. The language of the Act creating the existing court strikingly illustrates this, when it enacts that all jurisdiction vested in or exercised by any Ecclesiastical Court or person in England, etc., shall belong to and be vested in her Majesty. It was not previously vested in her, although she had appellate jurisdiction as supreme Ecclesiastical judge. If, before that Act had passed, the facts alleged in this petition had occurred, and the injured wife had applied to the Bishop of Durham for such relief in the matter as was then competent to him, is it possible to conceive any principle on which the guilty husband could demur to the Ordinary's jurisdiction? The wrong done in his diocese, the offending party openly and scandalously violating the laws of God and of the church in his diocese, why should he decline to interfere? What could it be to him whether the offender was born in any other diocese or born in any other country, Christian, heathen, or Mahometan, and had not in the eye of the secular Court abandoned his domicil therein? And what principle of international law could

there have been to create the slightest difficulty in the way of a decree for restitution, for separation *a mensâ et thoro*, or for alimony? The wrongdoer has elected to reside within the local limits of the jurisdiction of the Church Court, and neither the Court of the State nor the Church or State Court of his own country has any ground for alleging that the Church Court appealed to is usurping a jurisdiction, when it by Ecclesiastical monition, declaration, and censure, compels the offending party to give proper redress or declares the offended party to be thenceforth relieved from the obligation to provide for or to adhere to the bed and board of the other; which was what the decree of divorce *a mensâ et thoro* really amounted to.

(*d*) *The King's Courts* [1]

Extracts from HOLDSWORTH, HISTORY OF ENGLISH LAW.

The term "*Curia Regis*" means (i) the place where the king resided attended by the chief officials of his court and household; (ii) the supreme central court of the country where the business of the government in all its branches was transacted. The names of the officials, the forms of the legal proceedings, and the terms used to describe them were Norman. It was, in fact, a strong central court of this nature which was wanting to the Anglo-Saxon constitution.

The king had in Anglo-Saxon times a certain exclusive jurisdiction. The laws of Cnut and of Henry I give us a list of the pleas of the crown. Contempt of the king is a specified offense. Certain places like the royal streets, certain persons like the king's thegns are under the king's immediate jurisdiction. The king has his special peace. But the county, the hundred and the greater lords have also their peace and their jurisdiction.

Under the Norman kings we get a strong central court but no very distinct separation into departments of government. The Exchequer, it is true, in Henry I's reign seems to be beginning to have a distinct organization. But the Exchequer was staffed by the same body of officials who regularly took their places in the *Curia Regis*. At this period it is the personality of the king which gives to the *Curia Regis* its power, as the reign of Stephen clearly shows. The laws of Henry I recognize the law of the king's court as supreme all over the country. It constitutes a fourth species

[1] Carter, History of English Legal Institutions, Chaps. II–XXI; Inderwick, The King's Peace.

of law, superior to the tribal customs of the West Saxons, the Mercians, and the Danes in its stability and power. But we can see from these same laws that it has not yet attained either a definite jurisdiction or a definite organization.

The legal reforms of Henry II gave to the *Curia Regis* a more definite jurisdiction; and, as a consequence we begin to see at the end of this period the beginnings of a more definite organization of the powers of the state. . . .

The following is a list of the chief legislative acts which are of importance to legal history. (1) The Constitutions of Clarendon (1164). They were an attempt to settle the matters in dispute between church and state, and the limits of the jurisdiction of the lay and the ecclesiastical courts. (2) The Assize of Clarendon (1166). This is a set of instructions to the itinerant justices and sheriffs with reference to their duties and their jurisdiction. (3) The inquest of Sheriffs (1170). This directs a general inquiry into the methods in which the sheriffs had been conducting the local government of the country. (4) The Assize of Northampton (1176) was a reinactment and enlargement of the Assize of Clarendon. (5) The Grand Assize provided a new method for the trial of actions relating to the ownership of land. (6) The Assize Utrum provided for the trial of the question whether land is a lay fee or held in frankalmoigne. (7) The Possessory Assizes. The Assize of novel disseisin provided for the trial of the question whether A has disturbed B's seisin. The Assize of mort d'ancestre provided for the trial of a dispute as to who is the heir of the person last seised of a given estate of freehold. The Assize of darrein presentment provided for the trial of a dispute as to who was last seised of the right to present to a vacant living. In all these assizes the trial was by jury. In all these assizes the proceedings were by royal writ addressed either to the justices of the *Curia Regis*, to the sheriff, or to the lord of whom the land was held.

The result is that the *Curia Regis* draws to itself jurisdiction over criminal cases, and over actions relating to the ownership or possession of land held by free tenure. The pleas of the crown are now no longer described by the formless list which we find in the laws of Henry I. The opening words of Glanvil's treatise contain a classification which would have been impossible at the beginning of Henry II's reign. "*Placitorum*," he says, "*aliud est criminale, aliud civile. Item placitorum criminalium, aliud pertinet ad coronam domini regis, aliud ad vicecomitem.*" . . . The civil pleas of the

crown determined in the *Curia Regis* are pleas concerning baronies, the advowsons of churches, status, dower, the non-observance of a fine made in the *Curia Regis*, homage, reliefs, purprestures, debts of the laity, ownership, and possession. The civil pleas of the crown determined by the sheriff are the ownership of freehold where the lord has made default, and the ownership of villeins. The sheriff hears these pleas of the crown "*per breve domini regis.*" In the laws of Henry I the sheriff is vaguely stated to be unable to hear pleas of the crown "*sine diffinitis prelocucionibus*," but no attempt is made to describe the form which these royal mandates may take. Glanvil always gives the text of the various writs by which these proceedings are begun. We can see from Glanvil's book that the jurisdiction of the *Curia Regis* is an elastic jurisdiction. The register of original writs is constantly expanding. "As yet the king is no mere vendor, he is a manufacturer and can make goods to order; the day has not come when the invention of new writs will be hampered by the claims of a parliament; but still in Glanvil's day the *officina justitiae* has already a considerable store of ready made wares and English law is already taking the form of a commentary upon writs."

Some organization of the *Curia Regis* becomes necessary. For some years after the accession of Henry I the *Curia Regis* does not begin to split into departments. What division there is is rather a division between officials than between departments. The different members of the king's household — the justices, the chancellor, the treasurer, the chamberlain, the constable and the marshal — distribute among themselves the powers of government. The court itself is now a large court composed of all the greater vassals of the crown and the leading officials of the state, now a small executive body, now a law court consisting of a few royal judges. Sometimes the king himself, sometimes the members of the *Curia* or of the Exchequer travel over the country. But any court whether held before the king himself or before his justices is *Curia Regis* — the court which administers royal justice as distinct from the justice administered by the communal or the feudal courts.

At the end of this period we find that the court is beginning to split into various divisions in which we can discern the judicial system of the future.

I. The Common Law Courts.

Before describing in detail the various courts of common law we may notice that the courts were royal courts and that judges of

these courts were royal justices. From this three consequences followed. (1) The king had originally a large control over the business before the court. We have seen that in early days the king actually decided cases. There are instances of this in Henry III, Edward I and Edward II's reign. But when Fortescue wrote at the end of the 15th century it had ceased to be usual. Coke merely stated the existing practice in answer to James I's claim to decide cases for himself. Though the crown had thus ceased to take part in the proceedings of courts of law, he had many privileges and prerogatives in relation to such proceedings. It was claimed for him in James I's reign that he could peremptorily interfere to stop proceedings in any common law court by the writ of *Rege Inconsulto*. It was clear that he could sue in what court he pleased. In addition he had other smaller procedural advantages. Perhaps the right of the Attorney or Solicitor General to reply in a criminal case, though the prisoner has called no witnesses, is one of the last surviving of that "garland of prerogatives" which the older law gave to him. (2) The judges held their offices, as a rule, during the royal pleasure. The manipulation of the bench by the Stuarts led to the clause in the Act of Settlement which provided that the judges should hold office "*quamdiu se bene gesserint*"; but that it should be lawful for the crown to remove them on an address by the two Houses of Parliament. (3) They vacated their offices on the demise of the crown. An Act of Anne provided that the judges, with other officers of the crown, should continue to hold their offices for a space of six months after the demise of the crown.

An Act of George III's reign provided that the judges' tenure of office should be unaffected by the demise of the crown.

The following courts comprised the Courts of Common Law: 1. The court of Common Pleas. 2. The court of King's Bench. 3. The court of Exchequer. 4. The court of Exchequer Chamber.

GLANVILL, DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE, Cap. 3, 4 (1187). Beames's translation.

Civil Pleas are divided into such as are discussed and determined in the King's Court only, and such as fall within the Jurisdiction of the Sheriffs of Counties. In the former Court, are discussed and determined, all such Pleas as concern Baronies, Advowsons of Churches, questions of condition, Dower, when the woman has been entirely debarred from receiving it; for breach of Fine made in the King's Court; concerning the performing of Homage, and

the receiving of Reliefs, and concerning Purprestures, and Debts owing by lay persons. These Pleas, indeed, relate to the propriety of the thing only: concerning those which refer to the possession, and which are discussed and decided by Recognitions, we shall speak in their proper place.

To the Sheriffs of Counties these Pleas appertain: the Plea concerning the Right of Freehold, when the Courts of the Lords are proved to have failed in doing justice, the nature of which we shall speak of in another place; and the Plea concerning Villeins-born: such Pleas being, in each instance, sanctioned by the King's Writ.

Extracts from DIALOGUS DE SCACCARIO (1178–1179). Henderson's translation.

Disciple. What is the exchequer?

Master. The exchequer is a quadrangular surface about ten feet in length, five in breadth, placed before those who sit around it in the manner of a table, and all around it it has an edge about the height of one's four fingers, lest anything placed upon it should fall off. There is placed over the top of the exchequer, moreover, a cloth bought at the Easter term, not an ordinary one, but a black one marked with stripes, the stripes being distant from each other the space of a foot or the breadth of a hand. In the spaces, moreover, are counters placed according to their values; about these we shall speak below. Although, moreover, such a surface is called exchequer, nevertheless this name is so changed about that the court itself which sits when the exchequer does is called exchequer; so that if at any time through a decree anything is established by common counsel, it is said to have been done at the exchequer of this or that year. As, moreover, one says today "at the exchequer," so one formerly said "at the tallies."

D. What is the reason of this name?

M. No truer one occurs to me at present than that it has a shape similar to that of a chess board.

D. Would the prudence of the ancients ever have called it so for its shape alone, when it might for a similar reason be called a table (tabularium)?

M. I was right in calling thee painstaking. There is another, but a more hidden reason. For just as, in a game of chess, there are certain grades of combatants and they proceed or stand still by certain laws or limitations, some presiding and others advancing: so, in this, some preside, some assist by reason of their office, and

no one is free to exceed the fixed laws; as will be manifest from what is to follow. Moreover, as in chess the battle is fought between kings, so in this it is chiefly between two that the conflict takes place and the war is waged — the treasurer, namely, and the sheriff who sits there to render account; the others sitting by as judges, to see and to judge.

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D. Is that exchequer, in which such a conflict goes on, the only one?

M. No. For there is a lower exchequer which is also called the Receipt, where the money is handed over to be counted, and is put down in writing and on tallies, so that afterwards, at the upper exchequer, an account may be rendered of them; both have the same origin, however, for whatever is declared payable at the greater one is here paid; and whatever has been paid here is accounted for there.

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D. What is the nature or arrangement of the lower exchequer?

M. As I see, thou canst not bear to be ignorant of any of these things. Know then that the lower exchequer has its persons distinct from each other by reason of their offices, but with one intent devoted to the interests of the king, due regard, nevertheless, being paid to equity; all serving, moreover, not in their own names but in the names of their masters; with the exception of two knights, he namely, who conducts the assays, and the melter. Their offices depend on the will of our king; hence they seem to belong rather to the upper than to the lower exchequer as will be explained below. The clerk of the treasurer is there with his seal. There are also two knights of the chamberlains. There is also a certain knight who may be called the silverer, for, by reason of his office, he presides at the testing of silver. There are also four tellers to count the money. There is also the usher of the treasury and the watchman. These, moreover, are their offices: The clerk of the treasurer, when the money has been counted and put in boxes by the hundred pounds, affixes his seal and puts down in writing how much he has received, and from whom, and for what cause; he registers also the tallies which have been made by the chamberlains concerning that receipt. Not only, moreover, does he place his seal on the sacks of money, but also, if he wishes, on the chests and on the separate boxes in which the rolls and tallies are placed, and he diligently supervises all the offices which are under him, and nothing is hidden from him. The office of the knights, who are also called

chamberlains, because they serve in the name of the chamberlains, is this: They carry the keys of the chests; for each chest has two locks of a different kind, that is, to neither of which the key of the other can be fitted; and they carry the keys of them. Each chest, moreover, is girded with a certain immovable strap, on which, in addition, when the locks are closed the seal of the treasurer is placed; so that neither of the chamberlains can have access except by common consent. Likewise it is their duty to weigh the money which has been counted and placed by the hundred shillings in wooden receptacles, so that there be no error in the amount; and then, at length, to put them in boxes by the hundred pounds as has been said. But if a receptacle is found to have any deficiency, that which is thought to be lacking is not made good by calculation, but straightway the doubtful one is thrown back into the heap which is to be counted. And take note that certain counties, from the time of King Henry I and in the time of King Henry II, could lawfully offer for payment coins of any kind of money provided they were of silver and did not differ from the lawful weight; because indeed, by ancient custom, not themselves having moneyers, they sought their coins from on all sides; such are Northumberland and Cumberland. Coins thus received, moreover, although they came from a farm, were nevertheless set apart from the others with some marks placed on them. But the remaining counties were accustomed to bring only the usual and lawful coin of the present money as well from farms as from pleas. But after the illustrious king whose renown shines the brighter in great matters, did, in his reign, institute one weight and one money for the whole kingdom, each county began to be bound by one necessity of law and to be constrained by the manner of payment of a general commerce. All, therefore, in whatever manner they are bounden, pay the same kind of money; but nevertheless all do not sustain the loss which comes from the testing by combustion. The chamberlains likewise make the tallies of receipts, and have, in common with the clerk of the treasurer, to disburse the treasure received when required by writs of the king or an order of the barons; not, however, without consulting their masters. These three, all together or by turns, are sent with treasure when it is necessary. These three have the principal care of all that is done in the lower exchequer.

. . . . . .

M. Although the offices of those who have seats at the greater exchequer seem to differ in certain functions, the purpose, neverthe-

less, of all the offices is the same, to look out for the king's advantage; with due regard for equity, however, according to the fixed laws of the exchequer. The arrangement of ordering of the latter is confirmed by its antiquity and by the authority of the nobles who have their seats there. It is said to have begun with the very conquest of the kingdom made by King William, the arrangement being taken, however, from the exchequer across the seas; but they differ in very many and almost the most important points. Some believe it to have existed under the Anglo-Saxon kings, taking their argument in this matter from the fact that the peasants and already decrepit old men of those estates which are called of the crown, whose memory is gray in these matters, knew very well, having been taught by their fathers, how much extra money they are bound to pay on the pound for the blanching of their farm. But this argument applies to the payment of the farm, not to the session of the exchequer. The fact also seems to be against those who say that the blanching of the farm began in the time of the Anglo-Saxon kings, that in Domesday book, in which a diligent description of the whole kingdom is contained, and in which the value is expressed of the different estates as well of the time of King Edward as of the time of King William, under whom it was made,— there is no mention at all of the blanching of the farm; from which it seems probable, that after the time when that survey was made in the reign of the aforementioned king, the blanching of the farm was fixed upon by his investigators on account of causes which are noted below. But at whatever time it came into use, it is certain that the exchequer is conformed by the authority of the great, so that it is allowed to no one to infringe its statutes or to resist them by any kind of rashness. For it has this in common with the court itself of the lord king (*Curia Regis*), in which he in his own person administers the law, that no one is allowed to contradict a record or a sentence passed in it. The authority, moreover, of this court is so great, as well on account of the pre-eminence of the royal image, which, by a special prerogative, is kept on his seal of the treasury, as on account of those who have their seats there, as has been said; by whose watchfulness the condition of the whole kingdom is kept safe. For there sits the Chief Justice of the lord king by reason of his judicial dignity, as well as the greatest men of the kingdom, who share familiarly in the royal secrets; so that whatever has been established or determined in the presence of such great men subsists by an inviolable right. In the first place

there sits, nay also presides, by reason of his office, the first man in the kingdom — namely, the Chief Justice. With him sit, solely by command of the sovereign, with momentary and varying authority, indeed, certain of the greatest and most discreet men in the kingdom, who may belong either to the clergy or to the court. They sit there, I say, to interpret the law and to decide upon the doubtful points which frequently arise from incidental questions. For not in its reckonings, but in its manifold judgments, does the superior science of the exchequer consist. For it is easy when the sum required has been put down, and the sums which have been handed in are placed under it for comparison, to tell by subtraction if the demands have been satisfied or if anything remains. But when one begins to make a many-sided investigation of those things which come into the fisc in varying ways, and are required under different conditions, and are not collected by the sheriffs in the same way,— to be able to tell if the latter have acted otherwise than they should, is in many ways a grave task. Therefore the greater science of the exchequer is said to consist in these matters. But the judgments on doubtful or doubted points which frequently come up cannot be comprehended under one form of treatment; for all kinds of doubts have not yet come to light.

BRACTON, Bk. III, tr. 1, chap. 7, § 2. Twiss's translation.

But civil pleas for a thing or against a person, to be determined in the court of the king, are determined before different justices. For he has several courts, in which different actions are determined, and of those courts he has a special court of his own, as the King's Hall, and chief justices who determine the special causes of the king and of all others upon complaint, or through a privilege or franchise. As if there be some one who ought not to be impleaded, except before the king himself. He has also a court and resident justices of the Bench, who hold cognizance of all pleas, respecting which they have authority to take cognizance, and without a warrant they do not exercise jurisdiction nor coercion. He has also justices itinerant from county to county, sometimes to hear all pleas, sometimes to hear special pleas as to hold assises of novel disseysine or of the death of an ancestor, and to deliver jails, sometimes for one singly, or for two and not more. In all these cases the courts will be those of the king himself. And there are two recognitions, for instance, of novel disseysine and of the death of an ancestor, which ought not to be held except in their own counties by a

common franchise, and this unless they have been commenced in the counties, because if they have been commenced in a county, they may be transferred out of the county from place to place and be determined outside the county with all their consequences, as in convictions and in certifications, when they have taken place, and whether recognitions of this kind have been determined in the county or not, it is not forbidden, that convictions and certifications may be made outside the county. And as it has been said before in part, pleas in the above causes are carried from the courts-baron to the county, and there determined sometimes, and sometimes they are thence transferred and laid before the justices itinerant in a county, and thence before the justices of the bench, or before the king himself in many causes.

MAGNA CARTA. [These extracts are from the great Charter of Henry III.]

Cap. xi. Common Pleas shall not follow our court, but shall be holden in some place certain.

Cap. xii. Assises of novel disseisin and of mortdancestor shall not be taken but in the shires, and after this manner; if we be out of this realm, our Chief Justicer shall send our Justicers through every county once in the year, which with the knights of the shires shall take the said assises in those counties; and those things that at the coming of our aforesaid Justicers, being sent to take those assises in the counties, cannot be determined, shall be ended by them in some other place in their circuit; and those things which for difficulty of some articles cannot be determined by them, shall be referred to our Justicers of the Bench, and there shall be ended.

BRITTON, Bk. I, chap. 1 (about 1290). Nichols's translation.

1. First, with regard to our selves and our Court, we have ordained, that, inasmuch as we are not sufficient in our proper person to hear and determine all the complaints of our said people, we have distributed our charge in several portions, as is here ordained.

2. We will that our jurisdiction be superior to all jurisdictions in our realm; so that in all kinds of felonies trespasses and contracts, and in all manner of other actions personal or real, we have power to give, or cause to be given, such judgment as the case requires without any other process, whenever we have certain knowledge of the truth, as judge. And the Steward of our household shall take our place within the verge of our household; and his

office shall extend to the hearing and determining the presentments of the articles of our Crown, when we shall see good.

3. Further, we will that Justices Itinerant be assigned to hear and determine the same articles in every county and franchise every seven years; and that our Chief Justices of Ireland and Chester have the like power.

4. With respect to the Justices assigned to follow us and hold our place wheresoever we shall be in England, we will that they have cognizance of amending false judgments, and of determining appeals and other pleas of trespass committed against our peace, and that their jurisdiction and record shall extend so far as we shall authorize by our writs.

5. We will that the Earl of Norfolk, by himself or another knight, be attendant upon us and upon our Steward, to execute our commands and the attachments and executions of our judgments and those of our Steward throughout the verge of our house, so long as he shall hold the office of Marshal.

6. In our household let there be a Coroner to execute the business of the Crown throughout the verge and wheresoever we shall be or come within our realm; and let the same person or some other be assigned to assay all weights and measures in every our verge throughout our realm according to our standards; and these two duties he shall not fail to do by reason of any franchise, unless such franchise be granted in fee farm or in alms by us or our predecessors.

7. In every county let there be a sheriff who shall be attendant on our commands and those of our Justices; and let him have record of pleas pleaded before him by our writs; and under the sheriffs let there be hundredres serjeants and beadles attendant on the sheriffs. And in every county let there be coroners chosen for keeping the pleas of our peace, as shall be authorized in the chapters concerning their office, and let them have record of things relating to their office.

8. Moreover our will is, that there be Justices constantly remaining at Westminster, or at such other place as we shall be pleased to ordain, to determine common pleas according as we shall authorize them by our writs; and these Justices shall have record of the proceedings held before them by virtue of our writs.

9. Also our will is, that at our Exchequers at Westminster and elsewhere, our Treasurers and our Barons there have jurisdiction and record of things which concern their office, and to hear and

determine all causes relating to our debts and seignories and things incident thereto, without which such matters could not be tried; and that they have cognizance of debts owing to our debtors, by means whereof we may the more speedily recover our own.

10. And we will, that Justices be assigned in every county to have cognizance in such causes of petty assizes and other matters, as we shall assign them by our letters patent, of which causes we will that they have record. Let Justices also be appointed to deliver the gaols in every county, once in every pleadable week, while they find anything to do; and let them likewise have record of the pleas brought before them and of their judgments.

11. And although we have granted to our Justices to bear record of pleas pleaded before them, yet we will not that their record be any warrant to them in their own wrong, nor that they be permitted to erase their rolls or amend them or record contrary to the enrollment. And we will that the power of our Justices be limited in this manner, that they go not beyond the articles of our writs, or of presentments of jurors, or of plaints before them made, save that they shall have the cognizance of vouchers to warranty, and of other incidental matters without which the original causes could not be determined. And we forbid, that any have power of amending any false judgment of our Justices, except the Justices who follow us in our Court, who are authorized by us for that purpose, or ourselves, with our Council; for this we specially reserve to our own jurisdiction.

12. We forbid all our Coroners and Justices, and all others to whom we have given authority of record, that any, except our Steward and our Justices of Ireland and of Chester, without our leave substitute another in his place, to do any act of which he himself ought to make record; and if anything be done before such substitutes, we will that it be of no force, though it should be of abjuration or outlawry.

Extracts from COKE'S FOURTH INSTITUTE.

[Court of King's Bench.] Under these words (*proprias causas*) are included three things. First, all pleas of the crowne; as all manners of treasons, felonies, and other pleas of the crown which *ex congruo*, are aptly called *propriae causae regis*, because they are *placita coronae regis*. Secondly, regularly to examine and correct all and all manner of errors in fait, and in law, of all the judges and justices of the realm in their judgments, processe, and proceedings

in courts of record, and not only in pleas of the crown, but in all pleas, reall, personall, and mixt (the court of the exchecquer excepted, as hereafter shall appear). And this is *proprium quarto modo* to the king in this court: for regularly no other court hath the like jurisdiction, and therefore may be well called *propria causa regis*. And these two be of high and soveraign jurisdiction. Thirdly, this court hath not only jurisdiction to correct errors in judiciall proceedings, but other errors and misdemeanors extrajudiciall tending to the breach of the peace or oppression of the subjects, or raising of faction, controversy, debate, or any other manner of misgovernment; so that no wrong or injury, either publick or private, can be done, but that this shall be reformed or punished in one court or other by due course of law. As if any person be committed to prison, this court upon motion ought to grant an *habeas corpus*, and upon returne of the cause do justice and relieve the party wronged. And this may be done though the party grieved hath no privilege in this court. It granteth prohibitions to courts temporall and eclesiasticall, to keep them within their proper jurisdiction. Also this court may baile any person for any offence whatsoever. Fourthly, this court may hold plea by writ out of the chancery of all trespass done *vi et armis*, of replevins, of *quare impedit*, &c. Fifthly, this court hath power to hold plea by bill for debt, detinue, covenant, promise, and all other personall actions, *ejectione firmae*, and the like, against any that is *in custodia mareschalli*, or any officer, minister, or clerk of the court: and the reason hereof is, for that if they should be sued in any other court they should have the priviledge of this court; and lest there should be a fayler of justice (which is so much abhorred in law) they shall be impleaded here by bill though these actions be common ples, and are not restrained by the said act of Magna Charta, *ubi supra*. Likewise the officers, ministers, and clerks of this court priviledged by law in respect of their necessary attendance in court, may impleade others by bill in the actions foresaid.

[Court of Common Pleas.] Out of these, three things are to be observed: first what shall be said *communia placita*. They are not called *communia placita* in respect of the persons, but in respect of the quality of the pleas. Regularly pleas are divided into pleas of the crowne, and into common or civil pleas. Pleas of the crowne are treason and felony, and misprision of treason and felony, &c. This court is the lock and the key of the common law in common

pleas, for herein are reall actions, whereupon fines and recoveries (the common assurances of the realm) do passe, and all other reall actions by originall writs are to be determined, and also of all common pleas mixt or personall: in divers of which, as it appeareth before in the chapter of the King's Bench, this court and the king's bench have a concurrent authority. . . .

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So as in the exchecquer there are these seven courts. 1. The court of pleas. 2. The court of accounts. 3. The court of receipt. 4. The court of the exchecquer chamber being the assembly of all the judges of England for matters in law. 5. The court of exchecquer chamber for errors in the court of exchecquer. 6. A court in the exchecquer chamber for errors in the king's bench. 7. This court of equity in the exchecquer chamber. . . .

[Of Writs of Error in Parliament.] If a judgment be given in the king's bench either upon a writ of error, or otherwise, the party grieved may upon a petition of right made to the king in English, or in French (which is not *ex debito justitiae*, but for decency, for that the former judgment was given *coram rege*) and his answer thereunto, *fiat justitia*, have a writ of error directed to the chief justice of the king's bench for removing of the record *in praesens parliamentum*, and thereupon the roll itself, and a transcript in parchment is to be brought by the chief justice of the king's bench into the lords' house in parliament: and after the transcript in parchment is examined by the court with the record, the chief justice carrieth back the record itself into the king's bench, and then the plaintife is to assign the errors, and thereupon to have a *scire fac'* against the adverse party, returnable either in that parliament, or the next; and the proceeding thereupon shall be *super tenorem recordi, et non super recordum.* And the proceeding upon the writ of error is only before the lords in the upper house, *secundum legem et consuetudinem parliamenti.*

BLACKSTONE, COMMENTARIES, III, 55, 57.

The next court that I shall mention is one that hath no original jurisdiction, but is only a court of appeal, to correct the errors of other jurisdictions. This is the court of exchequer chamber; which was first erected by statute 31 Edw. III, c. 12, to determine causes by writs of error from the common law side of the court of exchequer. And to that end it consists of the lord chancellor and lord treasurer, taking unto them the justices of the king's bench and

common pleas. In imitation of which a second court of exchequer chamber was erected by statute 27 Eliz., c. 8, consisting of the justices of the common pleas, and the barons of the exchequer; before whom writs of error may be brought to reverse judgments in certain suits originally begun in the court of king's bench. Into the court also of exchequer chamber (which then consists of all the judges of the three superior courts, and now and then the lord chancellor also), are sometimes adjourned from the other courts such causes, as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below. From all the branches of this court of exchequer chamber a writ of error lieth to the House of Peers.

Before I conclude this chapter, I must also mention an eleventh species of courts, of general jurisdiction and use, which are derived out of, and act as collateral auxiliaries to, the foregoing; I mean the courts of assize and nisi prius.

These are composed of two or more commissioners, who are twice in every year sent by the king's special commission all round the kingdom (except London and Middlesex, where courts of nisi prius are holden in and after every term, before the chief or other judge of the several superior courts; and except the four northern counties, where the assizes are holden only once a year), to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster hall. These judges of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere*.

SMITH, ACTIONS AT LAW (3 ed. 1847), 8.

And, though the Queen's Bench and exchequer had at first, as has been explained, no jurisdiction over purely civil causes, those being all entrusted to the Common Pleas, yet, by a series of fictions, they contrived to draw all personal actions within their jurisdiction. For the Queen's Bench declared that a person in the custody of its marshal was before it for every purpose, and, as actions of trespass were considered to be still within its jurisdiction, being of a criminal nature, and a fine payable to the Crown by the defendant, the plaintiff was permitted to issue a writ charging the defendant with a trespass, which being then a cause for which a man might be arrested, he was taken and committed to the Marshalsea; and, being once there, the plaintiff might declare against him for any cause of action. Afterwards, they carried the principle

further, and held, that the defendant's appearance or putting in bail would answer the same purpose; for that in those cases, though not in the real, he was in the constructive custody of the marshal. And, therefore, till a few years since, all writs issuing out of the Queen's Bench described the cause of action to be trespass, in bailable cases, mentioning the real ground afterwards in an *ac etiam* clause, as if it were merely subsidiary to the fictitious one; and every declaration by bill in the Queen's Bench stated the defendant to be in the custody of the Marshal of Marshalsea. As to the Court of Exchequer, that tribunal adopted a simpler mode of extending its jurisdiction; for the plaintiff in his writ and declaration stated that he was a debtor to the king, and less able to pay his debts by reason of the defendant's conduct; and this, though in ninety-nine cases out of a hundred a mere fiction, was not allowed to be contradicted, and was held to render the cause of action a matter affecting the revenue, so as to invest the exchequer with a jurisdiction over it; thus did the Courts of Queen's Bench and Exchequer obtain a jurisdiction co-extensive with that of the Common Pleas in actions personal; a jurisdiction which the Uniformity of Process Act now recognises and confirms, while it abolishes the fictions by which it was acquired. . . .

Such being a slight history of the superior courts, the subject next to be inquired into is their present constitution. The first objects which engage our attention while occupied on this part of the subject are the Judges, of whom there are in each court five, in the Queen's Bench and Common Pleas a chief justice created by writ and four puisne judges created by patent. In the Exchequer, a chief baron and four puisne barons created by patent. The number which often varied, was in each Court for a long time four, but was increased to five by Stat. 1 Wm. 4, c. 70.

SUPREME COURT OF JUDICATURE ACT, 1873.

An Act for the constitution of a Supreme Court, and for other purposes relating to the better Administration of Justice in England; and to authorise the transfer to the Appellate Division of such Supreme Court of the Jurisdiction of the Judicial Committee of Her Majesty's Privy Council. (5th August, 1873.)

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the "Supreme Court of Judicature Act, 1873."

2. This Act, except any provision thereof which is declared to take effect on the passing of this Act, shall commence and come into operation on the second day of November 1874.

3. From and after the time appointed for the commencement of this Act, the several Courts herein-after mentioned, (that is to say), the High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

4. The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is herein-after mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction as herein-after mentioned as may be incident to the determination of any appeal.

5. Her Majesty's High Court of Justice shall be constituted as follows: — The first Judges thereof shall be the Lord Chancellor, The Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors of the High Court of Chancery, the Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes, the several Puisne Justices of the Courts of Queen's Bench and Common Pleas respectively, the several Junior Barons of the Court of Exchequer, and the Judge of the High Court of Admiralty, except such, if any, of the aforesaid Judges as shall be appointed ordinary Judges of the Court of Appeal.

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All the Judges of the said Court shall have in all respects, save as in this Act is otherwise expressly provided, equal power, authority, and jurisdiction; and shall be addressed in the manner which is now customary in addressing the Judges of the Superior Courts of Common Law.

The Lord Chief Justice of England for the time being shall be President of the said High Court of Justice in the absence of the Lord Chancellor.

6. Her Majesty's Court of Appeal shall be constituted as follows: There shall be five *ex officio* Judges thereof, and also so many ordinary Judges (not exceeding nine at any one time) as Her Majesty shall from time to time appoint. The *ex officio* Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer. The first ordinary Judges of the said Court shall be the existing Lords Justices of Appeal in Chancery, the existing salaried Judges of the Judicial Committee of Her Majesty's Privy Council, appointed under the "Judicial Committee Act, 1871," and such three other persons as Her Majesty may be pleased to appoint by Letters Patent; such appointment may be made either within one month before or at any time after the day appointed for the commencement of this Act, but if made before shall take effect at the commencement of this Act.

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The Lord Chancellor for the time being shall be President of the Court of Appeal.

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8. Any barrister of not less than ten years standing shall be qualified to be appointed a Judge of the said High Court of Justice; and any person who if this Act had not passed would have been qualified by law to be appointed a Lord Justice of the Court of Appeal in Chancery, or has been a Judge of the High Court of Justice of not less than one's year standing, shall be qualified to be appointed an ordinary Judge of the said Court of Appeal: Provided, that no person appointed a Judge of either of the said Courts shall henceforth be required to take, or to have taken, the degree of Serjeant-at-Law.

9. All the Judges of the High Court of Justice, and of the Court of Appeal respectively, shall hold their offices for life, subject to a power of removal by Her Majesty, on an address presented to Her Majesty by both Houses of Parliament. No Judge of either of the said Courts shall be capable of being elected to or of sitting in the House of Commons. Every Judge of either of the said Courts (other than the Lord Chancellor) when he enters on the execution of his office, shall take, in the presence of the Lord Chancellor, the

oath of allegiance, and judicial oath as defined by the Promissory Oaths Act, 1868. The oaths to be taken by the Lord Chancellor shall be the same as heretofore.

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16. The High Court of Justice shall be a Superior Court of Record, and, subject as in this Act mentioned, there shall be transferred to and vested in the said High Court of Justice the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following; (that is to say),

(1) The High Court of Chancery, as a Common Law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;

(2) The Court of Queen's Bench;

(3) The Court of Common Pleas at Westminster;

(4) The Court of Exchequer, as a Court of Revenue, as well as a Common Law Court;

(5) The High Court of Admiralty;

(6) The Court of Probate;

(7) The Court for Divorce and Matrimonial Causes;

(8) The London Court of Bankruptcy;

(9) The Court of Common Pleas at Lancaster;

(10) The Court of Pleas at Durham;

(11) The Courts created by Commissioners of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions.

The jurisdiction by this Act transferred to the High Court of Justice shall include (subject to the exceptions herein-after contained) the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any one or more of the Judges of the said Courts, respectively, sitting in Court or Chambers, or elsewhere, when acting as Judges or a Judge, in pursuance of any statute, law, or custom, and all powers given to any such Court, or to any such Judges or Judge, by any statute; and also all ministerial powers, duties, and authorities, incident to any and every part of the jurisdictions so transferred.

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18. The Court of Appeal established by this Act shall be a Superior Court of Record, and there shall be transferred to and

vested in such Court all jurisdiction and powers of the Courts following; (that is to say),

(1) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery, in the exercise of his and its appellate jurisdiction, and of the same Court as a Court of Appeal in Bankruptcy:

(2) All jurisdiction and powers of the Court of Appeal in Chancery of the county palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the duchy and county palatine of Lancaster when sitting alone or apart from the Lords Justices of Appeal in Chancery as a Judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the county palatine of Lancaster:

(3) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries assisted by his assessors, including all jurisdiction and powers of the said Lord Warden when sitting in his capacity of Judge:

(4) All jurisdiction and powers of the Court of Exchequer Chamber:

(5) All jurisdiction vested in or capable of being exercised by Her Majesty in Council, or the Judicial Committee of Her Majesty's Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy.

19. The said Court of Appeal shall have jurisdiction and power to hear and determine Appeals from any judgment or order, save as hereinafter mentioned, of Her Majesty's High Court of Justice, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such Rules and Orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act.

For all the purposes of and incidental to the hearing and determination of any Appeal within its jurisdiction, and the amendment, execution, and enforcement of any judgment or order made on any such appeal, and for the purpose of every other authority expressly given to the Court of Appeal by this Act, the said Court of Appeal shall have all the power, authority, and jurisdiction by this Act vested in the High Court of Justice.

31. For the more convenient despatch of business in the said High Court of Justice (but not so as to prevent any Judge from sitting whenever required in any Divisional Court, or for any Judge of a different Division from his own) there shall be in the said High Court five Divisions consisting of such number of Judges

respectively as herein-after mentioned. Such five Divisions shall respectively include, immediately on the commencement of this Act, the several Judges following; (that is to say),

(1) One Division shall consist of the following Judges; (that is to say), the Lord Chancellor, who shall be President thereof, the Master of the Rolls, and the Vice-Chancellors of the Court of Chancery, or such of them as shall not be appointed ordinary Judges of the Court of Appeal:

(2) One other Division shall consist of the following Judges; (that is to say), The Lord Chief Justice of England, who shall be President thereof, and such of the other Judges of the Court of Queen's Bench as shall not be appointed ordinary Judges of the Court of Appeal:

(3) One other Division shall consist of the following Judges; (that is to say), The Lord Chief Justice of the Common Pleas, who shall be President thereof, and such of the other Judges of Court of Common Pleas as shall not be appointed ordinary Judges of the Court of Appeal:

(4) One other Division shall consist of the following Judges; (that is to say), the Lord Chief Baron of the Exchequer, who shall be President thereof, and such of the other Barons of the Court of Exchequer as shall not be appointed ordinary Judges of the Court of Appeal:

(5) One other Division shall consist of two Judges who, immediately on the commencement of this Act, shall be the existing Judge of the Court of Probate and of the Court for Divorce and Matrimonial Causes and the existing Judge of the High Court of Admiralty, unless either of them is appointed an ordinary Judge to the Court of Appeal. The existing Judge of the Court of Probate shall (unless so appointed) be the President of the said Division, and subject thereto the Senior Judge of the said Division, according to the order of Precedence under this Act, shall be President.

The said five Divisions shall be called respectively the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division.

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Any Judge of any of the said Divisions may be transferred by Her Majesty, under Her Royal Sign Manual, from one to another of the said Divisions.

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32. Her Majesty in Council may from time to time, upon any report or recommendation of the Council of Judges of the Supreme Court herein-after mentioned, order that any reduction or increase in the number of Divisions of the High Court of Justice, or in the number of the Judges of the said High Court who may be attached to any such Division, may, pursuant to such report or recommendation, be carried into effect; and may give all such further directions as may be necessary or proper for that purpose; and such Order may provide for the abolition on vacancy of the distinction of the offices of any of the following Judges, namely, the Chief Justice of England, the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, which may be reduced, and of the salaries, pensions, and patronage attached to such offices, from the offices of the other Judges of the High Court of Justice, notwithstanding anything in this Act relating to the continuance of such offices, salaries, pensions, and patronage; but no such Order of Her Majesty in Council shall come into operation until the same shall have been laid before each House of Parliament for thirty days on which that House shall have sat, nor if, within such period of thirty days, an address is presented to Her Majesty by either House of Parliament, praying that the same may not come into operation. Any such Order, in respect whereof no such address shall have been presented to Her Majesty, shall, from and after the expiration of such period of thirty days, be of the same force and effect as if it had been herein expressly enacted: Provided always, that the total number of the Judges of the Supreme Court shall not be reduced or increased by any such Order.[1]

33. All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several Divisions and Judges of the said High Court, in such manner as may from time to time be determined by any Rules of Court, or Orders of Transfer, to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said Divisions respectively, in the manner hereinafter provided. Every document by which any cause or matter may be

[1] Pursuant to this provision, the Queen's Bench Division, the Common Pleas Division and the Exchequer Division in 1881 were merged in one, now known as the King's Bench Division. The powers that belonged to the presidents of these divisions were given to the Lord Chief Justice of the King's Bench, who is now called the Lord Chief Justice of England.

commenced in the said High Court shall be marked with the name of the Division, or with the name of the Judge, to which or to whom the same is assigned.

SUPREME COURT OF JUDICATURE ACT, 1875.

An Act to amend and extend the Supreme Court of Judicature Act, 1873. (11th August, 1875.)

Whereas it is expedient to amend and extend the Supreme Court of Judicature Act, 1873:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873 (in this Act referred to as the principal Act) and together with the principal Act may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875.

2. This Act, except any provision thereof which is declared to take effect before the commencement of this Act, shall commence and come into operation on the first day of November, 1875.

Sections twenty, twenty-one, and fifty-five of the principal Act shall not commence or come into operation until the first day of November, 1876, and until the said sections come into operation an appeal may be brought to the House of Lords from any judgment or order of the Court of Appeal herein-after mentioned in any case in which any appeal or error might now be brought to the House of Lords, or to Her Majesty in Council from a similar judgment, decree, or order of any Court or Judge whose jurisdiction is by the principal Act transferred to the High Court of Justice or the Court of Appeal, or in any case in which leave to appeal shall be given by the Court of Appeal.

. . . . . .

4. Her Majesty's Court of Appeal, in this Act and in the principal Act referred to as the Court of Appeal, shall be constituted as follows: There shall be five *ex officio* Judges thereof, and also so many ordinary Judges, not exceeding three at any one time, as Her Majesty shall from time to time appoint.

The *ex officio* Judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief

Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer.

The first ordinary Judges of the said Court shall be the present Lords Justices of Appeal in Chancery, and such one other person as Her Majesty may be pleased to appoint by Letters Patent. Such appointment may be made either before or after the commencement of this Act, but if made before shall take effect at the commencement of the Act.

The ordinary Judges of the Court of Appeal shall be styled Justices of Appeal.

The Lord Chancellor may by writing addressed to the President of any one or more of the following divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division, request the attendance at any time, except during the times of the spring or summer circuits, of an additional Judge from such division or divisions, (not being *ex officio* Judge or Judges of the Court of Appeal) at the sittings of the Court of Appeal, and a Judge, to be selected by the division from which his attendance is requested, shall attend accordingly.

Every additional Judge, during the time that he attends the sittings of Her Majesty's Court of Appeal, shall have all the jurisdiction and powers of a Judge of the said Court of Appeal, but he shall not otherwise be deemed to be a Judge of the said Court, or to have ceased to be a Judge of the division of the High Court of Justice to which he belongs.

Section fifty-four of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect: No Judge of the said Court of Appeal shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member.

APPELLATE JURISDICTION ACT, 1876.

An Act for amending the Law in respect of the Appellate Jurisdiction of the House of Lords; and for other purposes. (11th August, 1876.)

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Appellate Jurisdiction Act, 1876."

2. This Act shall, except where it is otherwise expressly provided, come into operation on the first day of November, one thousand eight hundred and seventy-six, which day is herein-after referred to as the commencement of this Act.

3. Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following; that is to say,

(1.) Of Her Majesty's Court of Appeal in England; and

(2.) Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute; and

(3.) Of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords, by common law or by statute.

4. Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal.

5. An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this Act designated Lords of Appeal; that is to say,

(1.) The Lord Chancellor of Great Britain for the time being; and

(2.) The Lords of Appeal in Ordinary to be appointed as in this Act mentioned; and

(3.) Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices.

6. For the purpose of aiding the House of Lords in the hearing and determination of appeals, Her Majesty may, at any time after the passing of this Act, by letters patent, appoint two qualified persons to be Lords of Appeal in Ordinary, but such appointment shall not take effect until the commencement of this Act.

A person shall not be qualified to be appointed by Her Majesty a Lord of Appeal in Ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two

years of some one or more of the offices in this Act described as high judicial offices, or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

Every Lord of Appeal in Ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown, but he may be removed from such office on the address of both Houses of Parliament.

There shall be paid to every Lord of Appeal in Ordinary a salary of six thousand pounds a year.

Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a Baron by such style as Her Majesty be pleased to appoint, and shall during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a Lord of Parliament shall not descend to his heirs.

On any Lord of Appeal in Ordinary vacating his office by death, resignation, or otherwise, Her Majesty may fill up the vacancy by the appointment of another qualified person.

A Lord of Appeal in Ordinary shall, if a Privy Councillor, be a member of the Judicial Committee of the Privy Council, and subject to the due performance by a Lord of Appeal in Ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a Privy Councillor, to sit and act as a member of the Judicial Committee of the Privy Council.

8. For preventing delay in the administration of justice, the House of Lords may sit and act for the purpose of hearing and determining appeals, and also for the purpose of Lords of Appeal in Ordinary taking their seats and the oaths, during any prorogation of Parliament, at such time and in such manner as may be appointed by order of the House of Lords made during the preceding session of Parliament; and all orders and proceedings of the said House in relation to appeals and matters connected therewith during such prorogation, shall be as valid as if Parliament had been then sitting, but no business other than the hearing and determination of appeals and the matters connected therewith, and Lords of Appeal in Ordinary taking their seats and the oaths as aforesaid, shall be transacted by such House during such prorogation.

Any order of the House of Lords may for the purposes of this Act be made at any time after the passing of this Act.

9. If on the occasion of a dissolution of Parliament Her Majesty is graciously pleased to think that it would be expedient, with a view to prevent delay in the administration of justice, to provide for the hearing and determination of appeals during such dissolution, it shall be lawful for Her Majesty, by writing under her Sign Manual, to authorise the Lords of Appeal in the name of the House of Lords to hear and determine appeals during the dissolution of Parliament, and for that purpose to sit in the House of Lords at such times as may be thought expedient; and upon such authority as aforesaid being given by her Majesty, the Lords of Appeal may, during such dissolution, hear and determine appeals and act in all matters in relation thereto in the same manner in all respects as if their sittings were a continuation of the sittings of the House of Lords, and may in the name of the House of Lords exercise the jurisdiction of the House of Lords accordingly.

15. Whereas it is expedient to amend the constitution of Her Majesty's Court of Appeal in manner herein-after mentioned: Be it enacted, that there shall be repealed so much of the fourth section of "The Supreme Court of Judicature Act, 1875," as provides that the ordinary Judges of Her Majesty's Court of Appeal (in this Act referred to as "the Court of Appeal") shall not exceed three at any one time.

In addition to the number of ordinary Judges of the Court of Appeal authorised to be appointed by "The Supreme Court of Judicature Act, 1875," Her Majesty may appoint three additional ordinary Judges of that Court.

. . . . . .

Her Majesty may by writing, under Her Sign Manual, either before or after the commencement of this Act, but so as not to take effect until the commencement thereof, transfer to the Court of Appeal from the following Divisions of the High Court of Justice, that is to say, the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, such of the Judges of the said Divisions, not exceeding three in number, as to Her Majesty may seem meet, each of whom shall have been a Judge of any one or more of such Divisions for not less than two years previously to his appointment, and shall not be an *ex officio* Judge of the Court of Appeal, and every Judge so transferred shall be deemed an additional ordinary Judge of the Court of Appeal in the same manner

as if he had been appointed such Judge by letters patent. No Judge shall be so transferred without his own consent.

Every additional ordinary Judge of the said Court of Appeal appointed in pursuance of this Act shall be subject to the provisions of sections twenty-nine and thirty-seven of "The Supreme Court of Judicature Act, 1873," and shall be under an obligation to go circuits and to act as Commissioner under commissions of assize or other commissions authorised to be issued in pursuance of the said Act, in the same manner in all respects as if he were a Judge of the High Court of Justice.

. . . . . .

16. Orders for constituting and holding divisional courts of the Court of Appeal, and for regulating the sittings of the Court of Appeal and of the divisional courts of appeal, may be made, and when made, in like manner rescinded or altered, by the President of the Court of Appeal, with the concurrence of the ordinary Judges of the Court of Appeal, or any three of them; and so much of section seventeen of "The Supreme Court of Judicature Act, 1875," as relates to the regulation of any matters subject to be regulated by orders under this section, and so much of any rules of court as may be inconsistent with any order made under this section, shall be repealed, without prejudice nevertheless to any rules of court made in pursuance of the section so repealed, so long as such rules of court remain unaffected by orders made in pursuance of this section.

17. On and after the first day of December one thousand eight hundred and seventy-six, every action and proceeding in the High Court of Justice, and all business arising out of the same, except as is herein-after provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Judge, and all proceedings in an action subsequent to the hearing or trial, and down to and including the final judgment or order, except as aforesaid, and always excepting any proceedings on appeal in the Court of Appeal, shall, so far as is practicable and convenient, be had and taken before the Judge before whom the trial or hearing of the cause took place: Provided nevertheless, that divisional courts of the High Court of Justice may be held for the transaction of any business which may for the time being be ordered by rules of court to be heard by a divisional court; and any such divisional court when held shall be constituted of two Judges of the court and no more, unless the President of the Division to which such

divisional court belongs, with the concurrence of the other Judges of such Division, or a majority thereof, is of opinion that such divisional court should be constituted of a greater number of Judges than two, in which case, such court may be constituted of such number of Judges as the President, with such concurrence as aforesaid, may think expedient; nevertheless, the decisions of a divisional court shall not be invalidated by reason of such court being constituted of a greater number than two Judges; and

Rules of court for carrying into effect the enactments contained in this section shall be made on or before the first day of December, one thousand eight hundred and seventy-six, and may be afterwards altered, and all rules of court to be made after the passing of this Act, whether made under "The Supreme Court of Judicature Act, 1875," or this Act, shall be made by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other Judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time and subject to be annulled in such manner as is provided by "The Supreme Court of Judicature Act, 1875."

(*e*) *The Custom of the Realm*

BLACKSTONE, COMMENTARIES, I, 67.

This unwritten or common law, is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which, for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which, by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. As to general customs, or the common law properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course by which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective

remedies of civil injuries; the several species of temporal offences, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the Chancery, the King's Bench, the Common Pleas, and the Exchequer; — that property may be acquired and transferred by writing; — that a deed is of no validity unless sealed and delivered; — that wills shall be construed more favorably, and deeds more strictly; — that money lent upon bond is recoverable by action of debt; —that breaking the public peace is an offence, and punishable by fine and imprisonment; — all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest; and 2. Established rules and maxims; as, "that the king can do no wrong," "that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of the maxims rests entirely upon general reception and usage; and the only method of proving that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.

But here a very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study; from the "*viginti annorum lucubrationes*," which Fortescue mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And, indeed, these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself, and all proceedings previous thereto, are carefully registered and preserved, under the name of records, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance.

GLANVILL, Preface. Beames's translation.

Each decision is governed by the Laws of the Realm, and by those Customs which, founded on reason in their introduction, have for a long time prevailed; and, what is still more laudable, our King disdains not to avail himself of the advice of such men (although his subjects) whom, in gravity of manners, in skill in the Law and Customs of the Realm, in the superiority of their wisdom and Eloquence, he knows to surpass others, and whom he has found by experience most prompt, as far as consistent with reason, in the administration of Justice, by determining Causes and ending suits, acting now with more severity, and now with more lenity, as they see most expedient. For the English Laws, although not written, may as it should seem, and that without any absurdity, be termed Laws, (since this itself is a Law — that which pleases the Prince has the force of Law) I mean, those Laws which it is evident were promulgated by the advice of the Nobles and the authority of the Prince, concerning doubts to be settled in their Assembly. For, if from the mere want of writing only, they should not be considered as Laws, then, unquestionably, writing would seem to confer more authority upon Laws themselves, than either the Equity of the persons constituting, or the reason of those framing them. But, to reduce in every instance the Laws and Constitutions of the Realm into writing, would be, in our times, absolutely impossible, as well on account of the ignorance of writers, as of the confused multiplicity of the Laws.

BRACTON, Bk. I, chap. 1, § 2. Twiss's translation.

Whereas in almost all countries they use laws and written right, England alone uses within her boundaries unwritten right and custom. In England, indeed, right is derived from what is unwritten, which usage has approved. But it will not be absurd to call the English laws, although they are unwritten, by the name of Laws, for everything has the force of Law, whatever has been rightfully defined and approved by the counsel and consent of the magnates, with the common warrant of the body politic, the authority of the king or the prince preceding. There are also in England several and divers customs according to the diversity of places: for the English have many things by custom, which they have not by (written) law, as in divers counties, cities, boroughs, and vills, where it will always have to be inquired, what is the custom of the place, and in what manner, they who allege a custom, observe the custom.

LANGBRIDGE'S CASE, COMMON PLEAS, 1345 (Y. B. Hil. 19 E. 3, No. 3, Pike's translation).

A writ was brought against a tenant who made default after default. — Huse. You have here John, who tells you that the person who makes default has only a term for life, the remainder being to John and his heirs for ever. And Huse produced a deed showing the gift, witnessing, etc., and prayed that he might be admitted. — R. Thorpe. You see plainly that his right is not proved by record or by fine, and we cannot have any answer to this deed, nor is it an issue to say that he has nothing in remainder; and, since we cannot have an answer to his statement, we pray seisin. — SHARSHULLE (J.). One has heard speak of that which BEREFORD (J.) and HERLE (J.) did in such a case, that is to say, when a remainder was limited in fee simple by fine they admitted the person in remainder to defend, and it was said by them that it would be otherwise if the limitation were by deed *in pais;* but nevertheless, no precedent is of such force as that which is right; now it is the fact that one in remainder has just as much right by virtue of a deed *in pais* as by fine, save that the fine is more solemn; therefore, if he would be entitled to be admitted by virtue of a fine, for the same reason he is by virtue of a deed; and the demandant is not in the position of having no answer, because he will have the same answer as the tenant would have if a writ of Formedon in the remainder were brought. — R. Thorpe. When any one has a reversion, whether in virtue of his own deed or by grant of the reversion, there is an outlying fact, which can be put to proof in the shape of lease to and attornment of the tenant, which fact is traversable; or there may be a plea that he has nothing in reversion; but with regard to this remainder, which is but parol, I who am a stranger, and cannot deny the specialty, am without answer. — Grene. You can traverse the gift in the form in which I have alleged it, or say that the tenant has a fee, or that the remainder was limited to another, or that the gift was made in fee simple, *absque hoc* that the remainder itself was limited to us as we suppose. — Birtone. Suppose the tenant were impleaded, and vouched in respect of his estate, and lost, and recovered over to the value, would not the person in remainder have execution in respect of this recovery to the value? Yes, he would have it. And that proves that the tenant, on such a deed, holds in his right; consequently he is entitled to be admitted; and otherwise he would suffer disherison; and if he is admitted that is no delay to the

demandant, because he will be answered immediately. — HILLARY (J.). You say what is true; and therefore, Demandant, will you say anything else to oust him from being admitted? — R. Thorpe. If it so seems to you, we are ready to say what is sufficient; and I think you will do as others have done in the same case, or else we do not know what the law is. — HILLARY (J.). It is the will of the Justices. — STONORE (J.). No; law is that which is right. And according to the opinion of the COURT he is entitled to be admitted. Therefore Thorpe said that the tenant had a fee; ready, etc. And the other side said the contrary.

MIRROR OF JUSTICES, chap. V, § 1, No. 3. Whittaker's translation.[1]

It is an abuse that the laws and usages of the realm, with their occasions, are not put in writing, so that they might be published and known to all.

JEFFERYS v. BOOSEY, HOUSE OF LORDS, 1854 (4 H. L. C. 815, 935–936)

POLLOCK, C. B.: The first is, whether by the Common Law of this country, the author of any published work has an exclusive right to multiply copies, that is, is entitled to what is commonly called copyright? This is a question upon which very great names and authorities are arrayed on either side. Some of the greatest lawyers have been of opinion that by the Common Law such an exclusive right existed, while it has been denied by others of at least equal authority. The whole question is most ably and elaborately argued and discussed on both sides, and all the authorities then existing are collected with great research in the celebrated case of *Millar* v. *Taylor;* and I entirely agree with my brother Parke,

[1] "The Mirrour of Justices, also called Liber Justiciariorum, a curious legal monument, probably written between 1285 and 1290. The text is preceded by five Latin verses, in the last of which the writer calls himself Andrew Horn. Of one Andrew Horn, who was chamberlain of the city of London in 1320, we know that in 1328 he bequeathed to the London Guildhall together with other books, his copy of the Liber Justiciariorum. We do not know the author, but he was hardly Andrew Horn. . . . The Mirrour contains a mixture of fiction and truth. It is the work of an amateur jurist, who, with the conceit of superior knowledge, represents the law such as in his opinion it ought to be, as being old law, giving his unbridled imagination full play, and inventing silly stories to explain the origin of legal institutions." Brunner, Sources of English Law, Select Essays in Anglo-American Legal History, II, 7, 38.

that the weight of mere authority, including the eminent persons who have expressed an opinion on the subject since the case of *Millar* v. *Taylor* was argued, is very much against the doctrine of a copyright existing at the Common Law.

In Mr. Justice Willes' judgment (giving a very able, elaborate, and learned exposition of the whole subject) he appears to think that, because upon general principles, he has satisfied himself of the justice and propriety of an author possessing such a right, therefore by the Common Law it exists. The passage is a remarkable one, and shows what were his views of the Common Law, and what, probably, he thought would not be considered strange or novel by the rest of the Judges. It is this: he is speaking of the allowance of "copy" as a private right; and he says, "It could only be done on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make Common Law without a precedent." My Lords, I entirely agree with the spirit of this passage, so far as it regards the repressing what is a public evil, and preventing what would become a general mischief; but I think there is a wide difference between protecting the community against a new source of danger, and creating a new right. I think the Common Law is quite competent to pronounce anything to be illegal which is manifestly against the public good; but I think the Common Law cannot create new rights, and limit and define them, because, in the opinion of those who administer the Common Law, such rights ought to exist, according to their notions of what is just, right and proper.

REPORT OF COMMISSIONERS[1] "TO TAKE INTO CONSIDERATION THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A SYSTEMATIC AND WRITTEN CODE THE COMMON LAW OF MASSACHUSETTS or any part thereof" (1836).

The next inquiry is, what is the true nature or character of the common law, so recognized and established, and where are its doctrines and principles to be found? In relation to the former part of the inquiry, it may be generally stated, that the common law consists of positive rules and remedies, of general usages and customs, and of elementary principles, and the developments or applications of them, which cannot now be distinctly traced back to any

[1] The Commissioners were: Joseph Story, Theron Metcalf, Simon Greenleaf, Charles E. Forbes, Luther S. Cushing.

statutory enactments, but which rest for their authority upon the common recognition, consent and use of the state itself. Some of these rules, usages and principles are of such high antiquity, that the time cannot be assigned when they had not an existence and use. Others of them are of a comparatively modern growth, having been developed with the gradual progress of society; and others, again, can hardly be said to have a visible and known existence until our own day. Thus, for example, many of the rights and remedies, which ascertain and govern the titles to real estate are of immemorial antiquity. On the other hand, the law of commercial contracts, and especially the law of insurance, of shipping, of bills of exchange, and of promissory notes has almost entirely grown up since the time (1756) when Lord Mansfield was elevated to the bench. And again, the law of aquatic rights and water courses, and the law of corporations can scarcely be said to have assumed a scientific form until our day.

In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form which fall within the letter of the language in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting theselves to the gradual changes of trade and commerce and the mechanical arts, and the exigencies and usages of the country. There are certain fundamental maxims in it which are never departed from; there are others again, which, though true in a general sense, are at the same time susceptible of modifications and exceptions, to prevent them from doing manifest wrong and injury.

When a case, not affected by any statute, arises in any of our courts of justice, and the facts are established, the first question is, whether there is any clear and unequivocal principle of the common law which directly and immediately governs it, and fixes the rights of the parties. If there be no such principle, the next question is, whether there is any principle of the common law which, by analogy, or parity of reasoning, ought to govern it. If neither of these sources furnishes a positive solution of the controversy, resort is next had (as in a case confessedly new) to the principles of natural justice, which constitute the basis of much of the common law; and if these principles can be ascertained to apply in a full and determinate manner to all the circumstances, they are adopted,

and decide the rights of the parties. If all these sources fail, the case is treated as remediless at the common law; and the only relief which remains is by some new legislation, by statute, to operate upon future cases of the like nature.

These remarks may be illustrated by referring to some of the most familiar cases, which occur in the every day business of life. In the common case of work and labor done for any person, or goods sold and delivered to him, the common law implies an obligation or duty in the person for whose benefit and at whose request it is done, to pay the amount of the price of the goods, or the value of the work and labor. Now, there is no statute from which this obligation or duty is derived. It is simply a dictate of natural justice, and from that source was adopted into the common law. The mode by which this obligation or duty was enforced in the ancient common law, was by the remedy called an action of *debt.* But this remedy was in some respects, and under some circumstances, liable to embarrassments and technical objections. About three hundred years ago, it occured to some acute lawyers, that another remedy, which would avoid these embarrassments and objections, might be applied. Accordingly, an action of trespass on the case, now well known by the name of an action of *indebitatus assumpsit,* was brought in the courts of Westminster Hall, to recover the amount of the debt. It was then very gravely debated, whether such an action would lie, and finally (after great diversity of opinion) it was settled in favor of the action. The principal ground of the decision was from the analogy to other well-known forms of actions on the case, and the undertaking or promise of the debtor, implied by law, to pay the debt, the breach of which undertaking or promise was a wrong to the other party, for which he was entitled to recover, not technically the debt, but damages to the full amount of the debt. And this is now the common mode, by which debts of this sort are usually sued for and recovered.

Again: When a man borrows money of another to be repaid to the lender, the common law, upon principles of natural justice, holds him liable to repay it, upon his express or implied agreement to that effect. But cases occurred, in which money in the hands of one person, in justice and equity, belonged to another; but it had not been borrowed, nor had the possessor promised to pay it over. On the contrary, he resisted the claim. The question then arose, whether in such a case the money was recoverable. And the courts of law, at a comparatively recent period, held, that an

action would lie for the recovery of it, and that the proper action was *indebitatus assumpsit*, for money had and received to the use of the party entitled. Here, again, the courts acted upon principles of natural justice, and founded themselves, both as to the right and the remedy to recover, upon the analogies of the law. They first inferred, from the principles of natural justice and the analogies of the law, an implied undertaking or promise to pay over the money, because in conscience and duty the holder was bound so to do; and next, they applied the remedy by analogy to other cases where there was an express promise of a similar nature.

Again: Until the reign of Queen Anne, promissory notes, although payable to bearer or order, were held not to be negotiable; so that no person but the payee could maintain an action for the money due on the same. The ground of this decision was, that debts, technically called choses in action, are not assignable at the common law, a doctrine which can be traced back to its early rudiments. This therefore, was a case, where, though the principles of natural justice might apply to create an obligation, the positive rules of the common law forbade it. Hence the interposition of the Legislature became indispensable. Nay, even the payee himself could not, according to the rules of the common law, maintain an action directly on the instrument; but he could only use it as evidence of a debt, in an action properly framed, upon the consideration for which it was given. When the Statute of the 3d and 4th Anne, chapter 9, made such promissory notes negotiable, it was found to be so convenient, that it was generally, though not universally nor without some exceptions and modifications, introduced either by statute or usage into the Colonies. In Massachusetts it was adopted by usage, and acted upon down to our day, without any other sanction than judicial recognition.

As soon as the negotiability of promissory notes was thus established, it gave rise to innumerable questions, as to the rights and responsibilities of the parties, which were either confessedly new, or but faintly indicated by antecedent principles. What were the nature and extent of the obligation of an indorser; what were the duties of the indorsee; when demand was to be made of payment of the maker; what notice was to be given, and how notice was to be given, by the holder to the indorser; — these, and very many questions of a like nature, were necessarily to be resolved. And so complicated and so various are the circumstances which may attend cases of this nature, that notwithstanding the long course

of decisions, which have in a great measure ascertained and qualified the rights and responsibilities of the parties, there yet remains a wide field for future discussions, growing out of the new and ever varying courses of business. The principles of natural justice have furnished many rules for the exposition of the contract and obligations of the parties; the analogies of the common law have furnished others; the usages of the mercantile world have furnished others; and, then again, there have been anomalies, which could not be brought within the range of any well defined principles, and therefore have been left to be regulated by legislative enactments. In this branch of the law, in an especial manner will be found a striking illustration of the remark of an eminent judge, that the common law is a system of principles, which expands with the exigencies of society. (pp. 29–33.)

MARKBY, ELEMENTS OF LAW, sec. 90, 91, 92.

90. The resource of the English lawyers when called on to fill the gap which was elsewhere supplied by the Roman Law was custom. Of this custom the judges were themselves, in the last resort, the repository. But the judges usually observed a discreet silence as to the source from which they derived the rules upon which their decisions were based. Here and there a judge or a counsel *arguendo* would mention a precedent, but if we may trust the reports contained in the Year Books, even this was rare. Still there appears to have been very little tendency to innovation; and there was doubtless a tradition of the courts to which every judge knew that he must conform at the peril of his reputation. Some record of the proceedings of the Superior courts of justice was always kept, and we have a series of such records commencing as early as the 6 Ric. II (1394). These early records might, and probably did, afford some guide in future cases, though they were not drawn up with that object. Moreover, at least as early as the reign of Edward I the practice was begun of drawing up in addition to these records, reports of cases heard and determined, the main and apparently the sole object of which was to furnish judges with precedents to guide them in their future decisions. In these Year Books there is very little argument, but only an ascertainment by oral discussion of the points at issue with the decision of the court. The reporter however frequently criticises the decision, and sometimes indicates in a note the general proposition of law which he supposes the decision to support. Reference is also sometimes

made by the reporter to other cases involving the same point. The later Year Books give the arguments somewhat more fully, but still we do not find previous cases frequently cited. From this we might be disposed to infer that the practice of citing cases in support of an argument or a judgment was still very rare even in the reign of Henry the Eighth, when the last Year Book was published. Yet this can hardly be so, for the reports of Plowden in the reign of Edward VI, which are much fuller than the latest Year Books, show that cases were at that time freely cited, and it is not likely that the practice came suddenly into existence. Moreover, we can scarcely account for the existence of the Year Books at all, unless we suppose that the lawyers studied them and made some use of them. The importance attached to the Year Books is further shown by the numerous reprints of them which were issued as soon as the art of printing was discovered, and also by the popularity of the abridgments made of them by Fitzherbert and Brooke. Probably, therefore, the influence of precedent upon the decisions of the judges is not to be measured by the number of cases quoted in the Year Books.

91. It is, however, always as indicating the custom of England, and not as authority, that the decisions of earlier judges were cited during all this period, and even afterwards. In the patent of James I for the appointment of official reporters it is indeed recited that the common law of England is principally declared by the grave resolutions and arrests of the reverend and learned judges upon the cases that come before them from time to time, and that the doubts and questions likewise which arise upon the exposition of statute laws are by the same means cleared and ruled. Nevertheless we find Blackstone still saying that the first ground and chief corner-stone of the laws of England is general and immemorial custom. But long before Blackstone's time, and in some measure perhaps owing to the patent of James I, a very important change had taken place in the view held by judges as to the force of prior decisions. These decisions were at first evidence only of what the practice had been, guiding, but not compelling, those who consulted them to a conclusion. But when Blackstone wrote, each single decision standing by itself had already become an authority which no succeeding judge was at liberty to disregard. This important change was very gradual, and the practice was very likely not altogether uniform. As the judges became conscious of it, they became much more careful of their expression, and gave much more

elaborate explanation of their reasons. They also betrayed greater diffidence in dealing with new cases to which no rule was applicable, cases of first impression as they were called; and they introduced the curious practice of occasionally appending to a decision an expression of desire that it was not to be drawn into a precedent.

92. Thus it comes to pass that English case law does for us what the Roman law does for the rest of Western Europe. And this difference between our common law and the common law of continental Europe has produced a marked difference between our own and foreign legal systems. Where the principles of the Roman law are adopted the advance must always be made on certain lines. An English or American judge can go wherever his good sense leads him. The result has been, that whilst the law of continental Europe is formally correct it is not always easily adapted to the changing wants of those amongst whom it is administered. On the other hand, the English law, whilst it is cumbrous, ill-arranged, and barren of principles, whilst it is obscure and not unfrequently in conflict with itself, is yet a system under which justice can be done. Anyhow it stands alone in the history of the world. The records of decisions have no doubt at all times and in all countries served as evidence of custom, just as the Year Books formerly served, and the court rolls of manors still serve, amongst ourselves. And even without the influence of custom, judges are never likely to disregard or to remain uninfluenced by the decisions of their predecessors. But nowhere else than in England and in countries which have derived their legal systems from England have the decisions of judges been systematically treated as authoritative.

(*f*) *Precedents and Case Law* [1]

HOLLAND, JURISPRUDENCE, chap. V.

In the weight which they attach to the decision of a court, legal systems differ very widely. While in England and in the United States a reported case may be cited with almost as much confidence as an Act of Parliament, on the Continent a judgment, though useful as showing the view of the law held by a qualified body of men, seems powerless to constrain another court to take the same view in a similar case.

The continental view is an inheritance from the law of Rome; for although Cicero enumerates '*res iudicatæ*' among the sources

[1] See Pollock, Essays in Jurisprudence and Ethics, 237–261.

of law, and the Emperor Severus gave binding force to the '*auctoritas rerum perpetuo similiter iudicatarum*,' the ordinary principle was finally established by a Constitution of Justin. The Codes of Prussia and Austria expressly provide that judgments shall not have the force of law, and although the Codes of France, Italy, and Belgium are silent on the point, the rule in all these countries is substantially the same, viz., that previous decisions are instructive but not authoritative; subject to certain special provisions of a strictly limited scope.

In England cases have been cited in court at least as early as the time of Henry I. They are, however, stated by Lord Hale to be 'less than law,' though 'greater evidence thereof than the opinion of any private persons, as such, whatsoever'; and his contemporary, Arthur Duck, remarks that the Common Law judges, in case of difficulty '*non recurrunt ad ius civile Romanorum, ut apud alias gentes Europeas, sed suo arbitrio et conscientiae relinquuntur.*' But in Blackstone's time the view was established that 'the duty of the judge is to abide by former precedents,' and it has long been well understood that our courts are arranged in this respect in a regular hierarchy, those of each grade being bound by the decisions of those of the same or higher grade, while the House of Lords is bound by its decisions.

There have been of late some symptoms of an approximation between the two theories. While on the continent judicial decisions are reported with more care, and listened to with more respect than formerly, indications are not wanting that in England and the United States they are beginning to be somewhat more freely criticised than has hitherto been usual.

BRACTON, Bk. I, chap. 2, § 3 (Before 1259). Twiss' translation.

Since, however, laws and customs of this kind are often abusively perverted by the foolish and unlearned (who ascend the judgment-seat before they have learnt the laws), and those who are involved in doubts and in (vague) opinions, are very frequently led astray by their elders, who decide causes rather according to their own pleasure than by the authority of the laws, I, Henricus de Bracton, have, for the instruction, at least of the younger generation, undertaken the task of diligently examining the ancient judgments of righteous men, not without much loss of sleep and labour, and by reducing their acts, counsels, and answers, and whatever thereof I have found noteworthy, into one summary, I have

brought it into order under titles and paragraphs (without prejudice against any better system), to be commended to perpetual memory by the aid of writing; requesting the reader, if he should find anything superfluous or erroneously stated in this work, to correct and amend it, or to pass it over with eyes half closed, since to retain everything in memory, and to make no mistakes, is an attribute of God rather than of man.

BRACTON, Bk. III, tr. 2, chap. 12, § 12. Twiss' translation.

But if there be any one who at the fourth county court wishes to give bail for any one accused of the principal act, as has been said in part, he shall not be heard, according to what Martin (de Pateshull) answered to Richard Duket concerning a certain escheat in the county of Kent. For which also makes what you have elsewhere, in the iter of Martin de Pateshull in the county of Worcester in the fifth year of the reign of King Henry. For it is there said that in the fourth county court no essoin is admitted of any one who is accused, nor ought any one to be heard who is desirous to give bail for such an one to produce him at another county court, unless this should be under a precept of the lord the king, which would rather be an act of his pleasure, than of his justice.

From the PRIOR OF LEWES v. THE BISHOP OF ELY, COMMON PLEAS, 1304 Y. B. 32 Edw. I., Horwood ed. p. 32.

Herle (of counsel for plaintiff, *arguendo*): But consider whether he shall be admitted to aver these three causes: for the judgment to be by you now given will hereafter be an authority in every *quare non admisit* in England; therefore consider if he shall be received to aver these three causes.

ANONYMOUS CASE, COMMON PLEAS, 1341. Y. B. Pasch. 15 Edw. III., No. 56.

Dower. Thorpe (counsel for defendant, pleading): She was not when her husband died of such age as she could merit dower. Hillary (J.): State with certainty of what age she was. Thorpe: Not nine years old. Gayneford (counsel for plaintiff): She was nine years old and more. Ready, etc. Thorpe: Show her age to have been such that she would have been dowable thereat, viz. ten years at least. Hillary (J.): In the case of John Benstede the widow was endowed at the age of nine years and a half. (Pike's translation.)

ANONYMOUS CASE, COMMON PLEAS, 1462. Y. B. 2 E. IV, 27.

In debt on a bond against A. R., late of F., the defendant says that at the time the writ, etc., he was conversant at M. without this that he ever lived at F. in the manner, etc. Littleton (counsel for defendant): To this you shall not be received against the bond. Billing (counsel for plaintiff): That is not an estoppel, for this was adjudged, M. 34 H. 6 fol. 19 [*i.e.*, Michaelmas Term in the 34th year of Henry VI], here in the case of one J. Weeks, late of Bristow. Needham and Danvers alone were on the Bench. Needham (J.) said that this is no estoppel, for it is with the bond, for it may be that F. is a place called F. in a town, and no farm or hamlet or place known outside of the town or hamlet, or that his name is R. M. of F. which F. is his own house in the town. . . . Danvers (J.) agreed . . . Littleton: I understand not, Sir, this was decided before you here in your time. M. 37 H. 6 fol. 5. Needham (J.): No, Sir, I believe not unless the bond makes mention of a town by express words, that is to say of the town of F.

ANONYMOUS CASE, COMMON PLEAS, 1537 (1 Dyer, 14*a*).

Willoughby asked of the Court, If lessee for years covenant for himself by the indenture of lease, that within the three first years he will build a new house and after the term finished, he die the covenant not performed, and the lessor for that breach bring a writ of covenant against his executors, Whether this lies, or not? that was the matter. And Shelley (J.) and Fitzherbert (J.) thought that it would. But it is otherwise of heirs, for the heir shall not be charged without naming him, but the executor shall. And so is 47 E. 3, 23. But Baldwin (C.J.) said secretly, That there is a diversity between an obligation in which no mention is of the executor, for that it is a duty; but covenant is executory, and sounds only in damages, and a tort, which (as it seems) dies with the person, etc.

NOTE, 2 Dyer 111*b* in marg. (1622).

Noy, of Lincoln's Inn, Mich. 19. Jac. at Moot in the Hall put this difference, that if a man make a feoffment in fee to the use of himself for life, the fee-simple remains in the feoffees, for otherwise he will not have an estate for life according to his intention; but if the use be limited to himself in tail, it is otherwise, for both estates may be in him.

BOLE v. HORTON, COMMON PLEAS, 1670. (Vaughan, 360, 382.)

Extract from the opinion of Vaughan, C. J.

An extra-judicial opinion, given in or out of a court, is no more than the *prolatum* or saying of him who gives it, nor can be taken for his opinion, unless everything spoken at pleasure must pass as the speaker's opinion. An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, opinion had been broached, is no Judicial opinion, nor more than a *gratis dictum*. But an opinion, though erroneous, concluding to the Judgment, is a Judicial Opinion, because delivered under the sanction of the Judge's Oath, upon deliberation, which assures it is or was when delivered the Opinion of the deliverer. Yet, if a court gives judgment judicially, another court is not bound to give like judgment, unless it think that judgment first given was according to law. For any court may err, else errors in judgment would not be admitted nor a reversal of them. Therefore if a Judge conceives a Judgment given in another court to be erroneous, he being sworn to judge according to Law, that is in his own conscience, ought not to give the like judgment, for that were to wrong every man having a like cause because another was wronged before, much less to follow extra-judicial Opinions unless he believes those Opinions are right.

BLACKSTONE, COMMENTARIES, I, 69 (1765).

It is an established rule to abide by former precedents where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain and perhaps indifferent is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.

MIREHOUSE v. RENNELL, HOUSE OF LORDS, 1833. (1 Cl. & F. 527.)

Extract from the opinion of Parke, B.: Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not

plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have decided. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of Law as a science.

DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 231.

The point I wish you to notice is that the authoritative force of judicial precedents is an established, and up to the present time at least, an essential part of the English and American systems of law. Let us trace more at large the scope and effect of this important doctrine. What is judicial precedent? Judicial precedent is not simply part of the law in a general sense, — that it is natural to yield to the influence of example and to follow what has been practised, — but it is a part of our law in a sense and with effects which are distinctively and most strikingly peculiar. The doctrine as established is shortly this: that a decision by a court of competent jurisdiction of a point of law lying so squarely in the pathway of judicial judgment that the case could not be adjudged without decision, is not only binding upon the parties to the cause or judgment, but the point so decided becomes, until it is reversed or overruled, evidence of what the law is in like cases, which the courts are bound to follow not only in cases precisely like the one which was first determined, but also in those which however different in their origin or special circumstances stand, or are considered to stand, upon the same principle. What is to be observed and remembered is that the adjudged case has an authoritative and not merely persuasive force. The doctrine is not limited in its scope and binding effect to cases which determine the true construction of a statute, but extends to the far larger class of cases which does not depend upon positive legislation, but must be determined by general reasoning. There is a difference of opinion among writers as to whether the precedent actually constitutes the law or is only authoritative evidence thereof. It is not proposed now to enter upon this discussion; it is enough to remark at this time that the precedent has in our legal system an authoritative effect. In continental Europe a judicial decision has no authoritative force in any other case,

whether in the same or any other court. But in England and in this country a point solemnly decided has the force and effect of law, binding the judges in all other cases that clearly fall within its principle, and which the judges are therefore bound to follow and apply, unless, to use Blackstone's well-known and much criticized qualification, the precedent is "flatly absurd or unjust."

To this doctrine we owe a weight of obligation which can not easily be overstated. By reason of the consequent importance, they have been reported for several hundred years, so that at this time the volumes of reports in England and this country number about eight thousand. These embody the learning, wisdom, and experience of the judges (often men of great intellectual powers) who during this long period have made the law and the practical administration of justice the subjects of profound study. Indirectly the reports embody also the results of the researches, studies, experience and ability of the bar during the same period, since of these judges have had the advantage in the argument of the causes so decided. Indeed, the doctrine of judicial precedent implies that the point to the decision whereof such force is attributed should have been argued by opposing counsel.

The value of these reports to the lawyer and to the judge is, I repeat, absolutely incalculable. It is a mine of wealth possessed by none but English-speaking peoples. Here the lawyer finds his true riches. What the art collections in the Vatican, in the Tribune Room, the Pinacotheka, in the Dresden Gallery, and in the Louvre are to the artist, the judicial reports are to the English and American lawyer. I yield to no one in my estimate of the store of riches they contain. I have not yet mentioned one of the chief elements of their possible usefulness. They are capable of being made quite as valuable to the legislator as to the lawyer, since the uninterrupted light of the experience of many generations of men shines forth from them to mark out and illumine the legislator's pathway. He need scarcely take a single step in the dark.

(g) *The Jury* [1]

i. Archaic modes of trial.

BIGELOW, HISTORY OF PROCEDURE IN ENGLAND, chap. IX.

The next step in the procedure was the appearance of the parties before the judges at the trial term. The medial judgment, as we

[1] Thayer, Preliminary Treatise on Evidence, Chaps. I–IV.

have seen, must have directed a trial in one of the following modes to wit, by compurgation, by witnesses, by charters, by record, by the ordeal, by the duel, or by the inquisition or recognition. Each of these will now be considered in order, from the final point of view, the trial.

First, then, the compurgation. This, in its essential features, consisted in bringing forward of a specified number of persons, by the party adjudged to give the proof to make oath in his favor: the number varying in ordinary cases from one to forty-eight, being dependent upon the rank of the parties, of the compurgators (one thegn, for example, being equal to six villeins), the value of the property, if property were involved, and the nature of the suit. These persons were to swear not to facts but to the credibility of the party for whom they appeared; though knowledge of the facts was probably deemed an important consideration in the making of the selection.

Trial by witnesses to the fact was very common both in the pre-Norman and in the Norman periods. Unlike compurgators who swore to their principal's credibility, witnesses to the fact swore to matters *de visu et auditu*. They differed, however, essentially from the inquisitors and recognitors of the time, and from modern witnesses. They gave their testimony in ordinary cases in accordance with the narrow formula of the medial judgment; they were not examined as to facts; and they appeared (in this particular like modern witnesses) at the instance of the party for whom they testified. The judge might examine them as to their competency, but if this were established, if they were sworn to be legal men of the neighborhood, they were entitled to give an answer according to the prescribed formula. They were triers, not witnesses in the modern sense, and few of the questions which arise at the present day upon the testimony of witnesses, such as the admissibility of evidence, could arise under the procedure of the Norman (pre-Norman) period. Both civil and criminal cases were tried in this way. Civil cases may be found in the records almost without number.

Of trial by charters, little need be said. The effect and interpretation of documents were ordinarily matter for the judges; and trial by charters had, in consequence, more of the features of trials of the present day than any other form of litigation except that by inquisition and recognition. The event was not, as it was in trial by wager of law and by party-witness, largely and often wholly in

the hands of the party who had delivered the last good pleading. Nor was it necessarily left to some external test, incapable in fact of discovering the truth. But as in the case of trial by inquisition, the truth was, if possible, sought by a rational and satisfactory mode of inquiry, as by a comparison of the seal in question with other seals of the same party, admitted to be genuine.

The next mode of trial to be noticed was the ordeal, commonly called *Judicium Dei*, sometimes simply *judicium*. It was, like the duel, the final test, from which there was no appeal. It was a solemn invocation to Heaven to decide the matter in dispute and the result of the test was regarded by the credulous masses as effected by the direct interposition of the Almighty. But it was only when the party had no charters and could furnish neither witnesses nor compurgators, that he resorted to ordeal, except in cases provided for by special legislation, as by the Assises of Clarendon and Northampton. It was applicable to women equally with men; and it was the legal mode of exculpation of a man accused by a woman of the murder of her husband.

The ordeal was more extensively employed in the procedure of the pre-Norman period than in the later. It was the typical mode of trial among the English, contrasting English procedure with the procedure of their Norman conquerors. With them it was, until the Conquest, the only *Judicium Dei* so far as existing monuments bear witness. It was used frequently in civil as well as in criminal cases before and for a considerable time after the Conquest. Even Normans who affected to despise the peculiar institutions of the English, sometimes resorted to the ordeal. In the time of the Conqueror his Norman Bishop Remigius purged himself of a charge of treason by the ordeal of fire, sustained by one of the household of the accused.

The ordeal may possibly have continued to be legal mode of trial for civil causes in the twelfth century so far as anything directly to the contrary appears, but the encroachment of the duel, of compurgation, and of the inquisition, was constantly narrowing its application to such cases and probably long before the end of the century, probably indeed, before the middle of it, it had become practically obsolete in civil litigation. Its use appears at the same time to have become somewhat narrowed in criminal procedure. In the latter half of the twelfth century and probably earlier, the duel had come to be recognized as a mode of trial in appeals of treason, if not in appeals of crime generally; though in the case of presentments,

where compurgation had probably been the common mode of trial, the Assises of Clarendon and Northampton had provided for trial by ordeal.

This mode of trial finally received a fatal blow from the well-known decree of the Lateran Council of the year 1215, at which it was ordered that the ordeal should be discontinued throughout Christendom.

There were four forms of ordeal, to wit, by cold water, by hot water, by hot iron and by morsel or "corsnaed." The first two were in the time of Glanvill for the poor and partly unfree classes, the "rustics"; the third was for the lay freemen; whilst the last, as we have seen, was for the clergy. The accused, however, appears to have had an election at one time between the modes by fire and by water. Whether this was true in the twelfth century is doubtful.

Each was undergone after the most solemn religious ceremonial. In the case of the cold water ordeal, a fast of three days duration was first submitted to in the presence of a priest; then the accused was brought into the church, where a mass was chanted, followed by the communion. Before communion, however, the accused was adjured by the Father, Son and Holy Ghost, by the Christian Religion which he professed, by the only begotten Son, by the Holy Trinity, by the Holy Gospels, and by the Holy Relics, not to partake of the communion if he was guilty. Communion having been partaken, *adjuratio aquae* is made by the priest in which the water is asked to cast forth the accused if guilty, and to receive him into its depths if innocent. After these ceremonies, the accused is stripped, kisses the book and the cross, is sprinkled with holy water, and then cast into the depths. If he sank he was adjudged not guilty; if he swam he was pronounced guilty.

Similar religious ceremonies were performed in the other forms of ordeal. If the accuser elected for the accused the trial by hot water, the water was placed in a vessel and heated to the highest degree. Then if the party were accused of an inferior crime, he plunged his arm into the water as far as the wrist and brought forth a stone suspended by a cord; if he were accused of a great crime, the stone was suspended deeper, so as to require him to plunge his arm as far as his elbow. The hand of the accused was then bandaged and at the end of three days the bandage was removed. If it now appeared that the wound was healed, the accused was deemed innocent, but if it had festered he was held guilty.

If trial by hot iron was elected, a piece of iron weighing either one or three pounds, according to the nature of the crime charged, was heated under the direction of men standing by, whose duty it was to see that a proper heat was obtained, and kept until the time for the test had arrived. During the final ceremonies the fire was left and the iron allowed to remain in the embers. It was raised and with an invocation to the Deity, given into the naked hand of the accused, who carried it the distance of nine feet when it was dropped, and the hand bandaged as in the case of the hot water ordeal to abide by the same test.

The ordeal of the morsel, accompanied by similar ceremonials, was undergone by the accused undertaking to swallow a piece of barley bread or a piece of cheese of the weight of an ounce; if he succeeded without serious difficulty, he was deemed innocent, but if he choked and grew black in the face he was deemed guilty.

From the ANGLO-SAXON LAWS.

The oath of him who discovers his property that he does not do it either for hatred or for envy:

By the Lord I accuse not N. either for hatred or for envy or for unlawful lust of gain; nor know I anything soother; but as my informant to me said, and I myself in sooth believe, that he was the thief of my property.

And the other's oath that he is guiltless:

By the Lord I am guiltless both in deed and counsel, of the charge of which N. accuses me.

His companion's oath who stands with him:

By the Lord the oath is clean and unperjured which N. has sworn.

Oath if a man finds his property unsound after he has bought it:

In the name of Almighty God, thou didst engage to me sound and clean which thou soldest to me, and full security against after-claim, on the witness of N., who then was with us two.

How he shall swear who stands with another in witness:

In the name of Almighty God, as I here for N., in true witness stand, unbidden and unbought, so I with my eyes oversaw and with my ears overheard that which I with him say.

Oath that he knew not of foulness or fraud:

In the name of Almighty God, I knew not on the things about which thou suest, foulness or fraud, or infirmity or blemish, up to that day's tide that I sold it to thee; but it was both sound and clean without any kind of fraud.

In the name of the Living God, as I money demand, so have I lack of that which M. promised me when I mine to him sold.

Denial:

In the name of the Living God I owe not to N. sceatt or shilling or penny or penny's worth; but I have discharged to him all that I owed to him, so far as our verbal contracts were at first.

GLANVILL, Bk. II, chap. 3. Beames' translation.

When at last, both the litigating parties are present in court, and the demandant has proceeded to claim the tenement in question, the Tenant may pray a View of the land. . . . After the three reasonable essoins which accompany the view of the land, both parties being again present in court, the demandant should set forth his demand and claim in this manner. . . . The demand and claim of the demandant being thus made, it shall be at the election of the tenant either to defend himself against the demandant by duel or to put himself upon the King's Grand Assise, and require a Recognition to ascertain which of the two have the greater Right to the Land in dispute.

But here we should observe, that after the Tenant had once waged the Duel he must abide by his choice, and can not afterwards put himself upon the Assise. In this stage of the suit the Tenant may again avail himself of the reasonable Essoins in succession with respect to his own person and of the same number with regard to the person of his Champion. All the Essoins which can with propriety be resorted to having expired, it is requisite before the Duel can take place, that the Demandant should appear in court, accompanied by his Champion armed for the contest. Nor will it suffice, if he then produce any other champion than one of those upon whom he put the proof of his claim, neither indeed, can any other contend for him, after the duel has been once waged.

But if he who has waged the duel should, in the interval, pending suit, happen to die, a distinction is to be made. If he died a natural death, and this is declared by the Vicinage (as it ought always to be, if there exist any doubt concerning the fact), the demandant may in the first place recur to one of those upon whom he placed his proof, or to another proper person, even if he have not named any other, provided that such other be an unobjectionable witness — and thus the Plea may begin again. If, however, his death was occasioned by his own fault, the Principal shall lose the cause. It may be asked whether the Champion of the Demandant

can substitute another in Court to make that proof which he took upon himself? According, indeed, to the law, and ancient custom of the realm, he can not appoint any other, unless it be his legitimate son, and here it may be observed, that the Champion of the Demandant should be such a person as is a proper witness of the fact. Nor is it lawful for the Demandant to prosecute his appeal in his own person, because it is not permitted unless by the intervention of a proper witness, who has heard and seen the fact.

But the Tenant may defend himself, either in his own proper person, if he choose so to do, or by any other unobjectionable witness, if he prefer that course. But if he has produced a Champion, and such a Champion should die in the interval, it may be asked, what the law is, whether the Tenant may defend himself by another champion, or whether he ought to lose his suit, or his seisin only? We must have recourse to our former distinction. It should be remarked that the champion of the tenant cannot substitute another in court for the purpose of undertaking the defence, unless it be his lawful son.

But it frequently happens, that a hired Champion is produced in court, who on account of a reward has undertaken the proof. If the adverse party should except to the person of such a Champion, alleging him to be an improper witness, because he had accepted a reward to undertake the proof, and should add, that he was prepared to prove this accusation against the Champion (if the latter chose to deny it) either by himself or by another, who was present when the Champion had taken the reward, the party shall be heard upon this charge, and the principal Duel shall be deferred. If, upon this charge, the Champion of the Demandant should be convicted and conquered in the Duel, then his principal shall lose the suit, and the Champion himself, as conquered, shall lose his law, namely, he shall thenceforth never be admitted in court, as a witness for the purpose of making proof by Duel, for any other person; but with respect to himself, he may be admitted, either in defending his own body, or in prosecuting an atrocious personal injury as being a violation of the King's peace. He may also defend his right to his own Fee and Inheritance, by Duel.

The Duel being finished, a fine of sixty shillings shall be imposed upon the party conquered in the name of Recreantise, and besides which he shall lose his law; and if the Champion of the Tenant should be conquered his Principal shall lose the Land in question, with all the fruits and produce upon it at the time of Seisin of the

fee, and never again shall be heard in Court concerning the same Land. For those matters, which have been once determined in the King's Court by Duel, remain forever after unalterable. Upon the determination of the suit, let the Sheriff be commanded by the following writ, to give possession of the land to the successful party.

. . . . . .

This is the course of proceeding, when the Demandant has been successful in the Duel. But if he has been conquered, in the person of his Champion, then the Tenant shall be freed from his claim, without any possibility of being again disturbed by him. Thus far concerning the Duel, where the Tenant should chuse or elect that mode of defending himself, against his Adversary.

ii. Development of the jury.

CAPITULARY OF LOUIS I., KING OF THE FRANKS, 829. Translated from Walter, Corpus Juris Germanici, II, 388.

VI. We will that every inquest (*inquisitio*) which is to be made of matters pertaining to the right of our fisc be made not by witnesses who shall have been brought forward, but by those who in that county are known to be best and most truthful; by their testimony let there be an inquest, and according to what they shall have testified, let them be retained or paid.

ABBOT OF ST. AUGUSTINE'S CASE, before the King's son in his absence (Temp. William I.) Translated from Bigelow, Placita Anglo-Normannica, 33.

William, the son of the King, to William, sheriff of Kent, Greeting: I command that you command Hamo, son of Vitalis, and the honest men of the vicinage of Sandwich, whom Hamo has named, that they declare the truth concerning the ship of the Abbot of St. Augustine, and if that ship proceeded through the sea on the day when the king last crossed the sea, then I command that it now proceed until the King comes into England, and meanwhile let the said Abbot be reseised. Witness the Bishop of Salisbury and Chancellor at Woodstock.

(Execution in same case.)

William, son of the King, to William, sheriff of Kent, Greeting: I command that you reseise the Abbot of St. Augustine of his ship, as I commanded by my other writ, and as it was found by the honest men of the county that the Abbot was then seised on the day

when last the king crossed the sea; and let him hold it in peace. Witness the Chancellor at Windsor. And this without delay that I may hear no more complaint thereof. Witness the same.

Extracts from GLANVILL, Bk. II.

But if the tenant should prefer putting himself upon the king's Grand Assise, the Demandant must either adopt the same course, or decline it. If the Demandant has once conceded in Court that he would put himself upon the Assise, and has so expressed himself before the Justices of the Common Pleas, he can not afterwards retract, but ought to stand or fall by the Assise.

The Grand Assise is a certain royal benefit bestowed upon the people, and emanating from the clemency of the prince, with the advice of his nobles. So effectually does this proceeding preserve the lives and civil condition of Men, that every one may now possess his right in safety, at the time that he avoids the doubtful event of the Duel. Nor is this all: the severe punishment of an unexpected and premature death is evaded, or, at least the opprobrium of a lasting infamy, or that dreadful and ignominious word that so disgracefully resounds from the mouth of the conquered Champion.

This legal Institution flows from the most profound Equity. For that Justice, which, after many and long delays, is scarcely, if ever, elicited by the Duel, is more advantageously and expeditiously attained, through the benefit of this Institution. This Assise, indeed, allows not so many Essöins as the Duel, as will be seen in the sequel. And by this course of proceeding, both the labor of men and the expenses of the poor are saved. Besides, by so much as the testimony of many credible witnesses, in judicial proceedings, preponderates over that of one only, by so much greater Equity is this Institution regulated than that of the Duel. For since the Duel proceeds upon the testimony of one Juror, this constitution requires the oaths of twelve lawful men, at least. These are the proceedings which lead to the Assise. The party who puts himself upon the Assise should, from the first, and in order to prevent his Adversary from subsequently impleading him, sue out a writ for keeping the peace, the suit being already pending between the parties concerning the Tenement, and the Tenant having put himself upon the Assise.

By means of such Writs, the Tenant may protect himself and may put himself upon the Assise, until his Adversary, appearing

in Court, pray another Writ, in order that four lawful Knights of the County, and of the Vicinage, might elect twelve lawful Knights from the same Vicinage, who should say, upon their oaths, which of the litigating parties have the greater right to the Land in question. The Writ for the summoning of the four Knights is as follows:

"The King to the Sheriff, Health. Summon, by good summoners, four lawful Knights of the Vicinage of Stoke, that they be at the Pentecost before me, or my Justices, at Westminster, to elect on their oaths, twelve lawful Knights of that Vicinage, who better know the truth, to return, on their oaths, whether M. or R. have the greater right in one Hyde of Land in Stoke, which M. claims against R. by my Writ, and of which R. the Tenant, hath put himself upon my assise and prays a Recognition to be made, which of them have the greater right in that Land; and, cause their names to be imbreviated. And summon, by good summoners, R. who holds the Land, that he be there to hear the election, and have there the Summoners, etc."

Upon this occasion, whether the Tenant appear or absent himself, the four Knights shall proceed upon their oaths to elect the twelve. But, if the tenant himself be present in Court, he may possibly have a just cause of Exception against one or more of the twelve, and concerning this he should be heard in Court. It is usual, indeed, for the purpose of satisfying the absent party, not to confine the number to be elected to twelve, but to comprise as many more as may incontrovertibly satisfy such absent party, when he return to Court. For Jurors may be excepted against by the same means by which Witnesses in the Court Christian are justly rejected. It should also be observed, that if the party, who has put himself upon the grand Assise, appear, although some of the four Knights are absent, the twelve may be elected by one of the four taking to himself two or three other Knights from the same County, if such happen to be in Court, though not summoned for the purpose, provided such course of proceeding meet with the approbation of the Court, and be mutually consented to by the litigating parties. But, for greater caution, and to avoid all possible cavil, it is usual to summons six or more Knights to Court, for the purpose of making the election.

The election of the twelve Knights having been made, they should be summoned to appear in Court, prepared upon their oaths to declare, which of them, namely, whether the Tenant, or the Demandant, possess the greater right to the property in question.

When the Assise proceeds to make the Recognition, the right will be well known either to all the Jurors, or some may know it, and some not, or all may be alike ignorant concerning it. If none of them are acquainted with the truth of the matter, and this be testified upon their oaths in Court, recourse must be had to others, until such can be found who do know the truth of it. Should it, however, happen that some of them know the truth of the matter, and some not, the latter are to be rejected, and others summoned to Court, until twelve, at least, can be found who are unanimous. But, if some of the jurors should decide for one party, and some of them for the other, then others must be added, until twelve at least, can be obtained who agree in favor of one side. Each of the Knights summoned for this purpose ought to swear, that he will neither utter that which is false, nor knowingly conceal the truth. With respect to the knowledge requisite on the part of those sworn, they should be acquainted with the merits of the cause, either from what they have personally seen and heard, or from the declaration of their Fathers, and from other sources equally entitled to credit, as if falling within their own immediate knowledge.

When the twelve Knights, who have appeared for the purpose of making Recognition, entertain no doubt about the truth of the thing, then, the Assise must proceed to ascertain, whether the Demandant, or Tenant, have the greater right to the subject in dispute.

But if they decide in favor of the Tenant, or make any other declaration, by which it should sufficiently appear to the King, or his justices, that the Tenant has greater right to the subject in dispute, then, by the Judgment of the Court, he shall be dismissed, forever released from the claim of the Demandant, who shall never again be heard in Court with effect concerning the matter. For those questions which have been lawfully determined by the King's Grand Assise, shall upon no subsequent occasion be with propriety revived. But, if by this Assise it be decided in Court in favor of the Demandant, then, his Adversary shall lose the Land in question, which shall be restored to the Demandant, together with all the fruits and produce found upon the Land at the time of Seisin.

Extracts from GLANVILL, Bk. XIII.

The general course of proceedings, as they more usually occur in Court upon the foregoing Writs of Right, having been so far treated of, it now remains to speak concerning the steps commonly

resorted to, where Seisin alone is in question. As these questions are, under the beneficial provisions of a law of the Realm, which is termed an Assise, usually and for the most part decided by a Recognition, our subject leads us to treat of the different kinds of Recognition.

There is one species of Recognition which is called mort d'Ancestor — another *de ultimis presentationibus* of Parsons to their churches — another, whether a Tenement be an Ecclesiastical Fee or Lay Fee — another, whether any one was seised of a Freehold on the day of his death, as of fee or as of pledge — another, whether anyone be under age or of full age — another, whether any one died seised of a certain Freehold as of Fee, or as of ward — another, whether any one presented the last Parson to a Church by virtue of a Fee that he held in his Demesne, or by virtue of a Wardship. And others of a similar description, which, as they frequently arise in Court when the parties are present, are, with their consent and the advice of the Court, directed in order to determine the point in controversy. But there is another Recognition which is called Novel Disseisin. . . .

In the last place, it remains for us to speak, concerning that species of Recognition, which is called Novel Disseisin. When any one, therefore, unjustly and without a Judgment has disseised another of his freehold; and the case fall within the King's Assise, or in other words, within the time for such purpose appointed by the King with the advice of his Nobles (which is sometimes a greater, sometimes, a less period) he shall have the following Writ:—

"The King to the Sheriff, Health. N. complains to me, that R. has, unjustly and without a Judgment, disseised him of his free Tenement, in such a vill, since my last Voyage into Normandy; and, therefore I command you, that if the aforesaid N. should make you secure of prosecuting his claim, then, you cause the Tenement to be reseised, with the chattels taken on it, and that you cause him with his chattels to be in peace, until the Pentecost; and, in the meantime, you cause twelve lawful and free Men of the Neighborhood to view the land, and their names to be imbreviated; and summon them, by good summoners, that they be then before me, or my Justices, prepared to make the Recognition; and put by gage and safe pledges, the aforesaid R. or his Bailiff, if he be not found, that he be then there to hear such Recognition, and have there, etc. Witness, etc."

But in this recognition, the party who has proved the Novel Disseisin, may obtain that the Sheriff should be directed to deliver him the Chattels and the Fruits, which have, by the authority of the King's Writ, or that of his Justices, been in the meantime seised. In no other Recognition does the Judgment of the Court usually make any mention concerning the Chattels or Fruits.

BRACTON, Bk. III, tr. 2, chap. 1, §§1—2.

A general summons to appear before the justices itinerant at certain days and places having been issued, which ought to contain at least a space of fifteen days, we must see in the first place in what manner and in what order proceedings should be held. And it is to be known in the first place, that they ought to begin with the pleas of the Crown, in which criminal actions, as well greater and less, are determined, unless the lord the king himself by chance has in some part ordered it to be done otherwise. And in the first place let the writs be read, which give them authority and power to make an *iter*, that it may be known respecting their authority, which having been heard, if it should please the judges, that some one of the older and more discreet in the presence of them all set forth the cause of their coming, and what is the utility of their itineration, and what is the advantage, if peace is observed, and these words are accustomed to be set forth by Martin de Pateshull. In the first place, concerning the peace of the lord the king and the violation of his justice by murderers and robbers and burglars, who exercise their malice by day and by night, not only against men travelling from place to place, but men sleeping in their beds, and that the lord the king commands all his faithful subjects, that in the faith by which they are bound to him, as they wish to preserve their own goods, that they should afford efficient and diligent counsel and advice to preserve his peace and justice, and to remove and repress the malice of the aforesaid, and more words of this kind; which having been set forth the justices ought to transfer themselves to some retired place, and having called to themselves four or six or more of the greater men of the county, who are called the "busones" of the county, and upon whose nod depends the votes of the others, the justices should thereupon have a consultation with them in turns, and explain to them how it has been provided by the king and by his counsel, that all as well knights as others, who are of fifteen years and more, ought to swear, that they will not harbour outlaws, murderers, robbers, or burglars, nor

confederate with them or their harbourers, and if they should know of any such, they will cause them to be attached and declare it to the viscount[1] and his bailiffs, and if they shall hear hue and cry respecting such people, immediately on hearing the cry they shall follow with their household and the men of their land.

. . . . . .

They shall swear also that if any one shall come in the vill or the borough or elsewhere, and shall buy bread, beer, or other victuals, and shall be held to be suspected that he is doing this for the help of the malefactors, that they shall arrest him and deliver him arrested to the viscount or his bailiffs. They shall swear also that they will receive no one into their house at night to lodge there, unless he be well known to them, and if by chance they shall have received any one to lodge, they shall not allow him to go away on the morrow before clear day, and this upon the testimony of three or four of the next neighbours. Let there be convoked afterwards the serjeants and bailiffs of the hundreds, and let there be enrolled in order the inhabitants of the hundreds or the wapentakes, and the names of the serjeants, of whom each shall pledge his faith, that he will choose from each hundred four knights, who shall come forthwith before justices to perform the precept of the lord the king, and who shall forthwith swear that they will choose twelve knights, or free and loyal men if knights cannot be found, who have no suit against any one, and are not sued themselves, nor have evil fame for breaking the peace or for the death of a man or other misdeed, and through whom the business of the king may be better and more usefully expedited. And let them cause the names of those persons to be enrolled in a certain schedule, and let them deliver the schedule to the justices, who also, when they shall have come, shall swear in this form, in the first place thus:

Hear this, ye justices, that I will speak the truth concerning this which ye shall ask me on the part of the lord the king, and I will do faithfully that which you shall enjoin me on the part of the lord the king, and I will not omit for any one not to do so according to my ability, so may God help me and these holy gospels of God. And afterwards they shall each of the others swear separately and by himself: The like oath which A. the first juror has here sworn, I will keep on my part, so may God help me and these holy etc.

[1] Latin *vicecomes*, sheriff. Wherever the word occurs in the extracts from Bracton, sheriff should be read. Viscount is a poor translation.

And when they have all so sworn, let there be read to them the articles in order, concerning which they shall answer before the justices, which things having been heard, let it be told them forthwith that they shall answer distinctly and openly in their verdict upon each article, separately and sufficiently of itself, and shall have their verdict by a certain day, and let it be said apart to them that if there be any one in their hundred or wapentake who is of evil repute respecting any misdeed, they shall seize him, if possible, but if that be not possible they shall cause the names of such persons to be given secretly to the justices, and the names of all persons who are of ill repute, in a certain schedule, and the viscount be enjoined to seize them forthwith, and to cause them when so seized to appear before the justices, that the justices may execute justice against them. But the articles, which are to be propounded to those twelve, are sometimes varied according to the variety of times and places, and sometimes they are augmented and sometimes they are diminished. But nevertheless let something be said concerning the articles (for example's sake) in what manner they are propounded in order.

BRACTON, Bk. IV, tr. 1, chap. 19, §§1–6.

But when they have come, exception may be taken in many ways against the jurors. For they can be repelled from taking the oath, in the same way as witnesses from giving testimony. But an infamous person is repelled from taking the oath, to wit, a person who has been convicted of perjury, because he has lost his law, and for that reason it is said that he is no longer law-worthy, as is said in English: "He ne es othes worthe that es enes gylty of oth broken." Likewise a person is repelled from taking the oath on account of a great and not a light enmity, present and not one which was some time ago, and not recently when he is produced. Likewise a person is repelled on account of present friendship, as on account of hatred. Likewise he is repelled who has made any claim of right in the thing concerning which he ought to swear. Likewise a serf is repelled from the oath of the jurors, and this upon the simple word of the protestors. . . . Likewise he is repelled on account of a close and not a slight intimacy. Likewise on account of consanguinity and present affinity, because they walk almost in the same steps, and this unless he is connected with the other party by the same tie of consanguinity or affinity. The same may be said above concerning friendship, intimacy, and enmity.

Likewise he is repelled, if he be accustomed to take his meals with him for whom he ought to swear, or is of his family. Likewise if he be so under his power, that he may be controlled or hurt or such like, as if he be in his household or so under his hand that he can be aggrieved in any way in regard of suits, services, or customs. Likewise if a juror or any of the parties be in the same cause or a similar one. Likewise he is repelled, if he is the counsel of either party or the advocate. Likewise it is to be noted that the causes of suspicion are sometimes present, and sometimes past, and that which has been and is not, has no place. Because a present cause ought to be alleged and proved, but not a past cause, because that which has been, is not, and for that reason it has no place, nor ought it to be approved. Likewise a cause is not sufficient, which is of long standing, unless it be present or recent, as for instance, if a juror and one of the parties were enemies before yesterday, or the day before yesterday, and although they are now not so, nevertheless such a cause of refusal is probable on account of its recent character. But there are several other causes of refusing jurors, concerning which I do not at present recollect, but which have been sufficiently enumerated for example's sake. And it is to be known that if once they be chosen with the consent of the parties, they cannot be refused on account of some new and supervening cause.

But when the parties have consented to the jurors, then let the assise proceed, and they ought immediately to swear in this form, and the first in these words: Hear this, ye justices, that I will declare the truth of this assise, and of the tenement of which I have made a view under the precept of the lord the king; or thus, of the tenement from which the said rent proceeds. Likewise if it be a common right of pasture, then thus: Concerning the pasture and the tenement or tenements whereof I have made a view. Likewise if anything be done as a nuisance on the ground of one person, that is a nuisance to the ground of another, as if a wall be raised; then let it be explained first concerning the thing which is the nuisance, and afterwards concerning the tenement to which the nuisance is worked, thus: Concerning the wall and tenement and such like whereof I have made a view, etc. And so generally concerning all things, in regard of which assises are held principally, and then: "and I will for nothing omit to say the truth, so may God me help and these hallowed things." And afterwards let all the jurors swear in order, each by himself, and in this manner: "Such oath as

he our said foreman has sworn, "I will keep on my part, so help me God and these hallowed things," etc. And it is to be noted that several assises may be held under one and the same oath, just as several novel disseysines concerning a tenement, and then thus: to wit, that I will speak the truth concerning those assises and tenements, and in like manner concerning the tenement, from which the said rent is derived. Likewise if a common right of pasture is adjunct, then thus: concerning the said tenements and the common right of pasture and the tenement, of which I have made a view, etc. Likewise if a nuisance be adjunct, then, after repeating all as above said, let it be said: concerning the foss, wall, or hedge, and such like, and concerning the tenements of which I have made a view, etc. And so let it be done in all assises, as of last presentation, of the death of an ancestor, and others. Likewise as several disseysines may be terminated by one jury or by several, so may several disseysines arise out of one act and be terminated by one assise or by several, as below. The oath then having been taken, as aforesaid, then let the chief notary read the substance of the writ for the instruction of the jurors, in this manner: Ye shall declare by the oath which you have made, if the said N. had unjustly and without a judgment disseysed the said N. of his free tenement in such a vill since the last return of king Henry, etc. or not. But the justices shall say nothing in this case for the instruction of the jurors, because nothing is said nor excepted from the commencement against the assise. But when the oath has thus been made, let the jurors retire into some separate place, and have a conference amongst themselves concerning the matter which they have been enjoined to execute, to whom let no one have access nor have conversation with them, until they have declared their verdict, nor let them by sign or word manifest to any one what is about to be said by them.

It happens also on many occasions that the jurors in saying the truth are contrary to one another, so that they cannot decline into one opinion. In which case with the advice of the court the assise may be strengthened, so that others may be added according to the number of the greater part which has dissented, or at least four or six and let them be adjoined to the others, or even let them by themselves without the others discuss and judge respecting the truth, and let them answer by themselves, and their verdict shall be allowed and shall hold good with those with whom they agree; and the others shall not be convicted for this reason, but shall be

amerced as if for a trespass, for it may still be the fact that they have spoken the truth and the others a falsehood, who may still be convicted of perjury. But when after their oath they have given their verdict either for one party or for the other, according to their declaration let judgment be pronounced, unless they have said something obscure, on account of which the justices may be led to examine, and either the seysine shall be adjudged to the plaintiff, or the defendant shall withdraw acquitted with his seysine: and sometimes it happens that each party will remain at mercy, or one only. And in the same way several disseysors by name, some fall under the penalty of disseysine, and some shall retire acquitted. And if they have spoken for the defendant, the plaintiff only is at mercy, and not his sureties, because he has prosecuted, although he has had an adverse judgment. The recognisors also may expound the whole truth of the business in short and few words to the justices, if all things are plain and fitted, and nothing is obscure. But if such doubtfulness or obscurity arises, that the solution is difficult, then let them be compelled to declare more clearly and more openly those things which are obscure, if this is possible for them, and the justices according to their declaration proceed to judgment. But if they cannot clear up that obscurity or doubtfulness in any manner, to wit, neither the recognisors themselves nor the others who have been called to reinforce them, then it will be safer that the parties be induced to agree, if it be possible, or let the judgment be referred to the high court, and there let the business be determined with the advice of the court. But if all things are plain which are contained in the record, then proceedings are to be had according to their declarations, and if they have well sworn, their verdict shall be binding; but if ill, there will be place for a conviction; but if they have spoken obscurely and dubiously, where a single speech may have a double meaning, or if the parties have been not fully examined, there will be place for a certificate, as will be explained below.

It will therefore have to be seen, whether they have spoken with certainty or with uncertainty, with clearness or with obscurity, or whether they have been doubtful in their verdict, or have been altogether ignorant. Likewise whether they have said anything against the person of the plaintiff, why he may not bring an assise, or against the person of the defendant, why he may not except against an assise, either because they say that on account of an error in the writ it cannot stand, or they answer according to those things,

which are enjoined to them, and which pertain to the assise only. But if they have spoken with certainty concerning those things which pertain to the assise, and not against the writ, then it is either true or false. If true, their verdict must stand, nor will a conviction have to be feared. But if false, then either knowingly or ignorantly: if knowingly, they commit perjury; but if ignorantly, as if they have been led by any just mistake, they are excused of grace. But if they have spoken with uncertainty, the judge ought to examine, that he may make it certain out of what is uncertain, clear out of what is obscure, true out of what is doubtful, otherwise their oath will be doubtful and perilous, and hence might follow a fatuous judgment. But if the jurors are altogether ignorant about the fact, and know nothing concerning the truth, let there be associated with them others who know the truth. But if even thus the truth cannot be known, then it will be requisite to speak from belief and conscience at least. And in which case they do not commit perjury, unless they go against their conscience, as will be explained more fully in treating of convictions. There will be place for a certificate, if they have been scantily examined, or have scantily answered to the interrogatories, so that they have spoken obscurely or ambiguously, or have been deceived by a just error. Likewise if they have spoken against the person of the plaintiff, wherefore he is not entitled to an assise, or against the person of the defendant, that he cannot except: if they have said this falsely, they commit perjury and fall under conviction, because the assise is held after the manner of an assise, which would not be the case if it were held after the manner of a jury; as if an exception of this kind, to wit, a cause, state, or convention, or condition, or such like should be raised by one party against the other party, and both parties should place themselves of their own accord on this subject upon a jury, when they have perhaps no other proof. Likewise if the jurors should say that the writ has been wrongly drawn, because there has been an error perhaps in the counties and in the names of the vills, and the names of the persons, or the surnames, or in the names of dignity or such like; there will not be much importance in this, because this objection has not been taken by the defendant by way of exception. Concerning, however, the names of the counties and the vills, it does not much matter, provided it is clear respecting the place, nor even concerning the names of the persons, provided it is clear respecting the persons. And because the defendant might have excepted at the commencement (if he wished),

against the writ, and he has not excepted, from the time when he forthwith put himself on the assise dissembling the error, he has approved the writ as if it were valid, and even although the jurors may have erred in this part, they do not commit perjury, since they are not consenting to a falsehood, because he who errs, does not consent. Likewise as a most diligent examination belongs to the justiciary, so a just delivery of a sentence pertains to him; but he ought before the judgment to examine the fact and the declarations of the jurors, that he may proceed securely to judgment.

And since the oath has in itself three companions, truth, to wit, justice, and judgment, truth is to be found in the jurors, justice and judgment in the judge. It seems, however, that sometimes judgment pertains to the jurors, when they ought to say upon their oath (provided, however, according to their conscience) if such an one has disseysed such an one, or has not disseysed him, and according to this let judgment be rendered. But since it belongs to the judge to pronounce and to render a just judgment, it will behoove him diligently to deliberate and examine, if the declarations of the jurors contain in themselves the truth, and if their judgment has been just or fatuous, lest it should happen that if he as judge should follow their declarations and their judgment, he should make a false or a fatuous judgment: for it is a false and fatuous judgment, that it might be so a false or fatuous judgment, as will be explained more fully below in treating of convictions.

MIRROR OF JUSTICES, chap. V, § 1, nos. 19, 35, 77, 126, 134, 136.

19. It is an abuse that justices drive a lawful man to put himself upon his country when he offers to defend himself against an approver by his body.

35. It is an abuse to charge the jurors to make presentment of wrongs done by neighbour to neighbour.

77. It is an abuse that writs of attaint are not granted in the chancery without difficulty for the attaint of all false jurors, as well in all other actions, personal, real, or mixed, as in the petty assizes.

126. It is an abuse that there is no trial by battle in personal actions as there is in case of felony.

134. It is an abuse to force jurors or witnesses to say what they do not know by distress of hunger and imprisonment, when their verdict is that they know nothing.

136. It is an abuse not to examine the jurors until one finds at least two of them in agreement.

BRITTON, Bk. I, chap. 5. Nichols's translation.

Afterwards let the jurors be charged of what fact they are to speak the truth. And then let them go and confer together, and be kept by a bailiff, so that no one speak to them; and if any one does so, or if there be any one among them who is not sworn, let him be committed to prison, and all the rest amerced for their folly in suffering it.

10. If they can not all agree in one mind, let them be separated and examined why they can not agree; and if the greater part of them know the truth and the other part do not, judgment shall be according to the opinion of the greater part. And if they declare upon their oaths, that they know nothing of the fact, let others be called who do know it; and if he who put himself on the first inquest will not put himself on a new jury, let him be remanded back to penance till he consents thereto.

ANONYMOUS CASE, COMMON PLEAS, 1393. (Year Book 21 and 22, Edw. I., 273.) Thayer's translation.

Roubery (J. to the assise): How say you he is next heir? The assize: Because he was born and begotten of the same father and the same mother, and his father on his death-bed acknowledged that he was his son and heir. Roubery (J.): You shall tell us in another way how he is next heir or be shut up without meat or drink till tomorrow morning. And then they said he was born before the ceremony, but after the betrothal.

ANONYMOUS CASE LIB. ASSISARUM, 41, 11, 1367. Thayer's translation.

In another assise before the same justices at Northampton, the assise was sworn; and they were all agreed but one, who would not agree with the xi, and afterwards they were remanded, and remained all day and the next day without eating or drinking, and afterwards the justices demanded of him if he would agree with his companions, and he said never, for he would die first in prison. Wherefore they took the verdict of the xi and commanded him to prison. And upon this a day was given in the Common Bench on the matter of the verdict. Kirketon (counsel for plaintiff) prayed judgment on the verdict, etc. Thorpe (C. J.) said they were all agreed that this was not a verdict taken from xi and that a verdict could not be taken from xi. But Kirketon told how Willoughby (J.) in trespass took the verdict of xi and sent the twelfth to prison

and the attaint was sued against the xi. and also W. Thorpe (J.) in an assise of the xx year of the present king (1345) took verdict of xi. Thorpe (C. J.): "That is no example to us, for they were greatly reproved for this." . . . And afterwards by assent of all the justices it was held that this was not a verdict, wherefore judgment was that the panel be quashed and null, and that he that was in prison be delivered. . . . Note that the justices said that they ought to have carried the assise with them in a cart until they were agreed.

FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, chaps. 25, 26 (about 1453). Amos's translation.

25. Whensoever the parties contending in the King's Courts are come to the issue of the Plea, upon the matter of fact, the justices forthwith, by virtue of the King's writ, write to the sheriff of the county, where the fact is supposed to be, that he would cause to come before them, at a certain day, by them appointed, twelve good and lawful men of the neighborhood, where the fact is supposed, who stand in no relation to either of the parties who are at issue, in order to enquire and know upon their oaths, if the fact be so as one of the parties alleges, or whether it be as the other contends it, with him. At which day the sheriff shall make return of the said writ before the same Justices, with a panel of the names of them whom he had summoned for that purpose. In case they appear, either party may challenge the array, and allege that the Sheriff had acted therein partially, and in favor of the other party, (viz.) by summoning such as are too much parties in the cause and not indifferent; which exception, if it be found to be true upon the oath of two men of the same panel pitched on by the Justices, the panel shall immediately be quashed and then the Justices shall write to the Coroners of the same County, to make a new panel; in case that likewise should be excepted against, and be made to appear to be corrupt and vicious, this panel also be quashed. Then the justices shall choose two clerks of the court, or others of the same county, who, sitting in the court, shall upon their oaths, make an indifferent panel, which shall be excepted to by neither of the parties; but being so impanelled and appearing in Court, either party may except against any particular person; as he may at all times, and in all cases, by alleging that the person so impanelled is of kin, either by blood or affinity to the other party; or in some such particular interest, as he can not be deemed an indifferent person to

pass between parties, of which sort of exceptions there is so much variety, as is impossible to shew in a small compass; if any one of the exceptions be made appear to the Court to be true and reasonable, then he against whom the exception is taken, shall not be sworn, but his name shall be struck out of the panel; in like manner shall be done with all the rest of the panel; until twelve be sworn so indifferent, as to the event of the cause, that neither of the parties can have reasonable matter of challenge against them: Out of these twelve, four at least, shall be Hundredors, dwelling in the Hundred where the Vill is situate, in which the fact disputed is supposed to be, and every one of the Jury shall have lands or revenues for the term of his life, of the yearly value at least of twelve scutes. This method is observed in all actions, criminal, real or personal; except where in personal actions, the damages, or thing in demand, shall not exceed forty marks English money: because, in such like actions of small value, it is not necessary nor required that the Jurors should be able to expend so much; but they are required to have lands or revenues, to a competent value at the discretion of the Justices; otherwise, they shall not be accepted; lest by reason of their meanness and poverty, they may be liable to be easily bribed, or suborned; and in case, after all exceptions taken, so many be struck out of the panel, that there does not remain a sufficient number to make up the jury, then it shall be given in charge to the Sheriff, by virtue of the King's writ, that he add more Jurors; which is usually and often done, that the enquiry of the truth upon the issue in question may not remain undecided, for want of Jurors. This is the form how Jurors, who enquire into the truth, ought to be returned, chosen and sworn in the King's Courts of Justice; it remains to enquire and explain, how they ought to be charged and informed as to their declaration of the truth of the issue before them.

26. Twelve good men and true men being sworn, as in the manner above related legally qualified, that is, having over and besides their movables, possessions in land sufficient (as was said) wherewith to maintain their rank and station; neither suspected by nor at variance with either of the parties; all of the neighborhood; there shall be read to them in English, by the court, the Record and nature of the plea, at length, which is depending between the parties; and the issue thereupon shall be plainly laid before them concerning the truth of which those who are sworn are to certify the court; which done, each of the parties, by themselves or their

Counsel, in presence of the court, shall declare and lay open to the Jury all and singular the matters and evidences whereby they think they may be able to inform the Court concerning the truth of the point in question; after which each of the parties has a liberty to produce before the Court all such witnesses as they please, or can get to appear on their behalf; who being charged upon their oaths, shall give in evidence all that they know concerning the truth of the fact, concerning which the parties are at issue: and, if necessity so require, the witnesses may be heard and examined apart, till they shall have deposed all that they have to give in evidence, so that what the one has declared shall not inform or induce another witness of the same side to give his evidence in the same words or to the very same effect. The whole of the evidence being gone through, the Jurors shall confer together, at their pleasure, as they shall think most convenient, upon the truth of the issue before them; with as much deliberation and leisure as they can well desire, being all the while in the keeping of an officer of the Court, in a place assigned to them for that purpose, lest anyone should attempt by indirect methods to influence them as to their opinion, which they are to give in the court. Lastly, they are to return into the court and certify the Justices upon the truth of the issue so joined in the presence of the parties (if they please to be present), particularly the person who is plaintiff in the cause; what the Jurors shall so certify in the Laws of England, is called the verdict. In pursuance of which verdict, the Justices shall render and form their judgment. Notwithstanding if the party against whom such verdict is obtained, complain that he is thereby aggrieved, he may sue out a writ of Attaint both against the Jury and also against the party who obtained; in virtue of which, if it be found upon the oath of twenty-four men (returned in manner before observed, chosen and sworn in due form of law, who ought to have much better estates than those who were first returned and sworn), that those, who were of the original panel and sworn to try the fact, have given a verdict contrary to evidence, and their oath; every one of the first Jury shall be committed to the public gaol, their goods shall be confiscated, their possessions seized into the king's hands, their habitations and houses shall be pulled down, their wood-lands shall be felled, their meadows shall be plowed up and they themselves ever thenceforward be esteemed, in the eye of the law, infamous, and in no case whatsoever are they to be admitted to give evidence in any Court or Record; the party who suffered

in the former trial, shall be restored to everything they gave against him, through occasion of such their false verdict; and who then (though he should have no regard to conscience or honesty) being so charged upon his oath would not declare the truth from the bare apprehensions and shame of so heavy a punishment, and the very great infamy which attends a contrary behavior? And if, perhaps, one or more among them should be so unthinking or daring as to prostitute their own character, yet the rest of the Jurors, probably would set a better value on their reputations than suffer either their good name or possessions to be destroyed and seized in such a manner; now, is not this method of coming at the truth better and more effectual than that way of proceeding, which the Civil Laws prescribe? No one's cause or right is, in this case, lost, either by death or failure of witnesses. The Jurors returned are well known, they are not inferior in condition; neither strangers, nor people of uncertain characters, whose circumstances or prejudices may be unknown. The witnesses [*i.e.*, jurors] are of the neighborhood, able to live of themselves, of good reputation and unexceptionable characters, not brought before the Court by either of the parties, but chosen and returned by a proper officer, a worthy, disinterested and indifferent person, and obliged under a penalty to appear upon the trial. They are well acquainted with all the facts, which the evidences depose, and with their several characters. What need more of words? There is nothing omitted which can discover the truth of the case at issue, nothing which can in any respect be concealed from, or unknown to a Jury, who are so appointed and returned, I say, as far as it is possible for the wit of man to devise.

ANONYMOUS CASE, COMMON PLEAS, 1514 (1 Dyer, 37*b*).

Note, That in Hill. Term 6. H. 8. Rot. 358 it was alleged in arrest of the verdict at *nisi prius*, that the jurors eat and drank: and it was found, upon examination, that they were agreed before and when they came back to give their verdict, they saw Rede, Chief Justice, going on the way to see an affray, and they followed him, and in going, they saw a cup and drank out of it; and for this, they were fined each forty pence; and the plaintiff had judgment upon the verdict; and error brought upon it.

STATUTE OF 23 HENRY VIII, chap. III (1531).

An act against perjury and untrue verdicts.

The King our sovereign Lord of his most goodly and gracious disposition, calling to his remembrance how that perjury in this

land is in manifold causes by unreasonable means detestably used, to the disheritance, and great damage of many and great numbers of his subjects well-disposed, and to the most high displeasure of Almighty God, the good statutes against all officers having return of writs and their deputies, making panels partially for rewards to them given, against unlawful maintainers, embracers, and jurors, and against jurors untruly giving their verdict notwithstanding; for reformation whereof, and forasmuch as the late noble King Henry the Seventh provided remedy for the same by a statute made in the eleventh year of his reign, which statute is now expired:

II. Be it therefore now enacted by the King our sovereign Lord, and the lords spiritual and temporal, and the commons in this present parliament assembled, and by authority of the same, That upon every untrue verdict hereafter given betwixt party and party, in any suit, plaint, or demand, before any justices, or judges of record, where the thing in demand, and verdict thereupon given, extendeth to the value of xl. li. and concerneth not the jeopardy of man's life, to the party grieved by the same verdict shall have a writ of attaint against every person hereafter so giving an untrue verdict, and every of them, and against the party which shall have judgment upon the same verdict. (2) and that in the same attaint there shall be awarded against the petit jury, the party and the grand jury, summons, resummons, and distress infinite, which grand jury shall be of like number as the grand jury is now in attaint, and every of them that shall pass in the same, shall have lands and tenements to the value of twenty marks by the year of freehold, out of the ancient demean; (3) and upon the distress, which shall be delivered of record upon the same, open proclamation to be made in the court there; (4) the distress shall be awarded more than fifteen days afore the return of the said distress, and every such distress shall be made upon the land of every of the said grand jury, as in other distresses is and hath been used; (5) and if the said party defendant, or the petit jurors, or any of them, appear not upon the distress, then the grand jury to be taken against them and every of them that shall so make default; (6) and if any of the said petit jury appear, then the party complainant in that behalf shall assign the false serement of the first verdict untruly given, whereunto they of the petit jury shall have no answer, if they be the same persons, and the writ process, return and assignment good and lawful except that the demandant or

plaintiff in the same attaint hath afore been nonsuit, or discontinued his suit of attaint taken for the same, or hath for the same verdict, in a writ of attaint, had judgment against the said petit jury, but only that they made true serement, which issue shall be tried by twenty-four of the said grand jury; (7) and the party shall plead that they gave true verdict, or any other matter which shall be a sufficient bar of the said attaint; (8) and that plea notwithstanding the grand jury to be taken without delay, to enquire whether the first jury gave true verdict or no.

III. And if they find that the said petit jury gave an untrue verdict, then every of the said petit jury to forfeit xx. li. whereof the one half shall be to the King our sovereign Lord, and the other half to the party that sueth.

IV. And over that, That every of the said petit jury shall severally make fine and ransom, by the discretion of the justices before whom the said false serement shall be found, after their several offences, defaults, and sufficiency of every of the said petit jury; (2) and after that, those of the said petit jury so attainted shall never after be in any credence, nor their oath accepted in any court; (3) and if such plea as the party pleadeth, which is a bar of the said attaint, be found, or deemed against him that so pleadeth, then the party that so sueth, shall have judgment to be restored to that he lost, with his reasonable costs and damages.

V. Foreseen alway, That any *utlare* in action or cause personal, or *excommengement* pleaded or alleged in the party plaintiff or demandant, shall be taken but as a void plea, and to that he shall not be put to answer; (2) and that in all the aforesaid process such day shall be given as in a writ of dower, and none essoin or protection to lie, nor to be allowed in the same; (3) and if the said grand jury appear not upon the first distress had against them, so that the jury for their default do remain, he that maketh default shall forfeit to the King xx. s. and upon the second distress xl. s. and after making default, for every such default v. li. and like penalties and forfeitures to be against them, and every of them, that shall be named in the *Tales*, as is before expressed against every of the said grand jury aforesaid; (4) and that for and by the death of the party, or any of the said petit jury, the said attaint shall not abate, nor be deferred against the remnant, as long as two of the said petit jury be alive.

VI. And if hereafter any false verdict be given in any action, suit, or demand afore any justice or judge of record, of any thing

personal, as debt, trespass, and other like, which shall be under the value of xl. li. that then the party grieved shall have attaint, with such process and pleas as is afore rehearsed, and delays to be taken away, as is afore remembered; (2) except that in this case of attaint, every person of the grand jury that may dispend v. marks by the year of freehold out of ancient demean, or is worth an hundred marks of goods and chattels, shall be able to pass in the same attaint. (3) And if the petit jury be attainted, that then they shall in this case of attaint every of them to forfeit v. li. whereof one half shall be to the King, and the other half to the party, after the form afore rehearsed, and over that to make fine and ransom by the discretion of the justices, as is aforesaid.

VII. And if there be not persons of such sufficiency within the shire or place where any of the said attaints shall be taken, as may pass into the same, be it ordained by the authority abovesaid, That then one *Tales* shall be awarded into the shire next adjoining, by the discretion of the justices afore whom the same attaints shall be taken, which shall be warned to appear upon like pains as aforesaid, and enabled to pass in the said attaints, as if they were dwelling in the shire where the same attaint shall be taken. (2) And that the same laws, action and remedy ordained by this present act, be kept for and to all them that shall be grieved by such untrue verdicts of any inheritance in descent, reversion, remainder, or of any freehold in reversion or remainder. (3) And if the party in attaint given by this act be nonsuit, or the same discontinue, that then the same party so nonsuit, or so discontinuing the said attaint, make fine and ransom by the discretion of the justices afore whom the said attaint shall be taken and depending.

VIII. And that all attaints hereafter to be taken, shall be taken afore the King in his bench, or afore the justices of the common place, and none in other courts; (2) and that *nisi prius* shall be granted by discretion of the justices upon the distress; (3) and every of the said petit jury may appear, and answer by attorney in the said attaint; (4) and that the moiety of the said forfeiture of the petit jury shall be levied to the use of our sovereign Lord the King by *capias ad satisfaciendum*, or *fieri fac'* or *elegit*, or by action of debt against every person of the petit jury so forfeiting, and against his executors and administrators, having then sufficient goods of their said testator not administred, and the other moiety shall by like process be levied to the use of the party that sueth any attaint given by this act against every of the said petit

jury and his executors or administrators, having then sufficiency of goods, as is aforesaid, not administred; (5) this act, and execution thereof to be had, and like judgment for the party defendant or tenant, to be discharged of restitution, as afore this present act in case of a grand attaint hath been used; (6) and if there be divers plaintiffs or demandants in attaint, that the nonsuit or release of any of them shall not be in any wise hurtful or prejudicial to the residue, but that they and every of them in such cases may be summoned and severed, like as it is used when there be divers demandants in actions real.

ANONYMOUS CASE, COMMON PLEAS, 1562 (2 Dyer, 218*a*).

A juror fined in Banc, who at the assizes having eaten would not agree with his fellows, though on being sent back he did agree, and the verdict allowed.

ANONYMOUS CASE, COMMON PLEAS, 1579 (3 Dyer, 364*b*).

Attaint brought in the Common Bench upon a false verdict given in B. R. upon an information of usury: and the plaintiff was a prisoner in the Marshalsea in execution for the penalty s. as well for the plaintiff the informer, as for the Lady the Queen. And a writ of mainprise with sufficient surety, came from the Chancellor directed to the Justices of C. B. to enlarge the prisoner for the prosecution of his attaint, and to etc., if etc., and a writ was directed out of C. B. to the marshal to have the body with the cause on such a day, etc. And the marshal did not come upon the writ, wherefore he was amerced in the last Term forty pounds. And now this Term a new writ was awarded on pain of one hundred marks, directed to the marshal, etc., who returned, that the prisoner was in execution for the debt, recovered as well for the Lady the Queen, as for the party; and therefore without a special precept or warrant from the Court of B. R. he could not, nor would have him in C. B., etc. But yet at length he produced the body, etc. . . . *Memorandum*, That in the principal case aforesaid it was much doubted, Whether the recognizance of the mainpernors should be made copulative or disjunctive, s. to render the body to the prison of the Lady the Queen, *or* to satisfy the sum in the condemnation, notwithstanding the copulative words in the writ. . . . And at length it was resolved in this Term by the Justices, that as well for the discouragement of suitors in the attaint, who are in execution by the trial by verdict, as by reason of the warrant to the

Justices, which comprehends a copulative, the better precedent is to follow that. Wherefore the plaintiff was committed to the Fleet for the execution, without finding any mainprise: and by the leave of the Court he shall be suffered with a keeper to go to his counsel with instructions to prosecute the attaint, etc. And in next Trin. Term the attaint passed against the plaintiff affirming the first verdict.

COKE ON LITTLETON, 155*a* (1628).

"*Quod faciat 12 liberos et legales homines de vicineto, etc.*"

Albeit the words of the writ be *duodecim*, yet by ancient course the sherife must return 24; and this is for expedition of justice: for if 12 onely be returned, no man should have a full jury appear, or be sworn in respect of challenges, without a *tales*, which should be a great delay of tryalls. So as in this case, usage and antient course maketh law. And it seemeth to me, that the law in this case delighteth herselfe in the number of 12; for there must not onely be 12 *jurors* for the tryall of matters of fact, but 12 judges of ancient time for tryall of matters of law *in the Exchequer Chamber*. Also for matters of state there were in ancient time twelve *Counsellors of State*. He that wageth his law must have *eleven others with him*, which thinke he says true. And that *number of twelve* is much respected *in holy writ*, as 12 *apostles*, 12 *stones*, 12 *tribes*, etc.

BUSHEL'S CASE, COMMON PLEAS, 1670. (Vaughan, 135.)

The King's writ of Habeas Corpus . . . issued out of this court, directed to the then sheriffs of London, to have the body of Edward Bushel, by them detained in prison, together with the day and cause of his caption and detention, on Friday then next following, before this Court, to do and receive as the court shall consider.

[Vaughan, C. J. delivered the opinion of the court from which the following extracts are taken:]

In the present case it is returned that the prisoner, being juryman, among others charged at the session court at the old Baily, to try the issue between the King and Penn and Mead, upon the indictment for assembling unlawfully and tumultuously, did against the full and manifest evidence openly given in court, acquit the prisoners indicted in contempt of the King, etc.

The verdict of a jury, and evidence of a witness are very different things, in the truth and falsehood of them. A witness swears

but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a juryman swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact enquired after; which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him.

The judge . . . cannot know the fact possibly, but from the evidence which the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is. It is true, if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case; though even when the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that; for, being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is stranger. 2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court, is absolutely false; but to this the judge is a stranger, and he knows no more of the fact than he hath learned in court, and perhaps by false depositions, and consequently knows nothing. 3. The jury may know the witnesses to be stigmatized and infamous, which may be unknown to the parties, and consequently to the court. 4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the judge is a stranger. 5. If they do follow his direction, they may be attainted, and the judgment reversed for doing that, which if they had not done, they should have been fined and imprisoned by the judge which is unreasonable. 6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punished by distinct judicatures for the same offence, which the common law admits not. . . . 7. To what end is the jury to be returned out of the vicinage whence the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have

nearer knowledge of the fact than those of the vicinage in general? To what end are they challenged so scrupulously to the array and poll? To what end must they have such a certain freehold, and be *probi & legales homines*, and not of affinity with the parties concerned? To what end must they have in many cases the view for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their knowledge? A man cannot see by another's eye, nor hear by another's ear, no more can a man conclude or infer the thing to be resolved by another's understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least *in foro conscientiae*. 9. It is absurd a jury should be fined by the judge for not going against their evidence, when he who fineth knows not what it is; as where a jury find without evidence in court on either side. So if the jury find upon their knowledge, as the course is if the defendant plead *solvit ad diem* to a bond proved, and offers no proof. The jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea. And it is absurd to fine a jury for finding against their evidence, when the judge knows but part of it; for the better and greater part of the evidence may be wholly unknown to him. [The jurors were discharged.]

WOOD v. GUNSTON, UPPER BENCH, 1655. (Style, 466.)

Wood brought an action upon the case against Gunston for speaking of scandalous words of him; and amongst other words, for calling him a Traytor, and obteyns a verdict against him at the Bar, wherein the jury gave 1500£ damages. Upon the supposition that the damages were excessive, and that the jury did favour the Plaintiff, the Defendant moved for a new tryal. But Sergeant Maynard opposed it, and said that after a verdict the partiality of the Jury ought not to be questioned, nor is there any Presidents for it in our Books of the Law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new tryal, but if it were, the damages are not here excessive, if the words spoken be well considered, for they tend to take away the Plaintiff's estate, and his life. Windham, on the other side, pressed for a new tryal, and said it was a packed

business, else there could not have been so great damages, and the Court hath power in extraordinary cases, such as this is, to grant a new tryal. Glyn, Chief Justice. It is in the discretion of the Court in some cases to grant a new tryal, but this must be a judicial, and not an arbitrary, discretion and it is frequent in our Books for the Court to take notice of miscarriages of Juries, and to grant new tryals upon them, and it is for the people's benefit that it should be so, for a Jury may sometimes by indirect dealings be moved to side with one party and not be indifferent betwixt them, but it cannot be so intended of the Court; wherefore let there be a new tryal the next term, and the Defendant shall pay full costs, and the judgment to be upon this Verdict to stand for security to pay what shall be recovered upon the next verdict.

HIXT v. GOATS, KING'S BENCH, 1615. (1 Rolle, 257.)

Sir Baptist Hixt had judgment in the Common Pleas against Goats and Fleetwood, and now on writ of error it was assigned for error that the covenant alleged was that whereas a bargain was made for certain land between the plaintiff and defendants, the defendant covenanted that if there were not so many acres upon the measure as the defendant had said to the plaintiff that the land sold amounted to, that he would repay 11 *l.* for each acre which lacked of the number, and alleged that upon the measure so many acres in certain were lacking as amounted at 11 *l.* an acre to 700 *l.*, and the issue was whether they were lacking, and the jury found for the plaintiff and gave 400 *l.* damages. Croke (of counsel for plaintiff in error): It seems that this issue is repugnant, for of necessity if so many acres were lacking as the plaintiff alleged, they ought to find 700 *l.* damages, and if they do not find that so many are lacking, the verdict ought not to be found against the plaintiff. Coke (C. J.): It seems to be good enough, for there may be divers reasons why in equity they ought not to give so much damage as this amount, for it seems here that the jurors are chancellors, and it seems such verdict is good in an action on the case because only damages are to be recovered, but it is otherwise where a debt is to be recovered, and judgment was affirmed by the court as to this point.

RAVENCROFT v. EYLES, COMMON PLEAS, 1766. (2 Wilson, 294.)

Extract from the opinion of Wilmot, C. J.

The quantum of damages is nothing to the purpose, for if the jury had power in this case to give damages, we must now take it

that they have done right; and I am of the opinion that the jury were not confined to give the exact damages in the final judgment, but had a power and discretion to assess what damages they thought proper, for this being an action upon the case, the damages were totally uncertain and at large.

[This was an action against a sheriff for permitting an imprisoned debtor to escape, so that the plaintiff lost the amount of his judgment against the debtor.]

ALDER v. KEIGHLEY, EXCHEQUER OF PLEAS, 1846. (15 Meeson & Welsby, 117.)

The learned judge in summing up, directed the jury that . . . the assignees . . . were entitled to recover the 600 *l.* minus the 100 *l.* and the discount . . . Pollock. C. B. . . . The question is, what was the contract, and was it broken by the defendant? No doubt all questions of damages, are, strictly speaking, for the jury; and however clear and plain may be the rule of law on which the damages are to be found, the act of finding is for them. But there are certain established rules according to which they ought to find; and here there is a clear rule — that the amount which would have been received if the contract had been kept, is the measure of the damage if the contract is broken.

SEDGWICK, DAMAGES, 201–2. (1 Ed. 1847.)

It is in truth but slowly, and at comparatively a recent period, that the jury has relinquished its control over even actions of contract, and that any approach has been made to a fixed and legal measure of damage. But by degrees the salutary principle has been recognized, and it is now well settled, that in all actions of contract . . . and in all cases of tort where no evil motive is charged, the amount of compensation is to be regulated by the direction of the court, and the jury cannot substitute their vague and arbitrary discretion for the rules which the law lays down.

WIGMORE, EVIDENCE, I, § 8.

The details of the history of the rules of evidence can best be examined while considering the particular rules each in its place. But it is worth while to notice here summarily the historical development of the general system in its main features, and the relative chronology of the different rules. Some notion can thus be obtained of the influence of certain external circumstances on the

rules at large, and of some of the individual principles upon the others.

The marked divisions of chronology, for our law of evidence, may be said to be seven, — from primitive times to 1200 A.D., thence to 1500, thence to 1700, to 1790, to 1830, to 1860, and to the present time:

(1) A. D. 700–1200. Up to the period of the 1200s, the history of the rules of evidence, in the modern sense, is like the chapter upon ophidians in Erin; for there were none. Under the primitive practices of trial by ordeal, by battle, and by compurgation, the proof is accomplished by a *judicium Dei*, and there is no room for our modern notion of persuasion of the tribunal by the credibility of the witnessses; for the tribunal merely verified the observance of the due formalities, and did not conceive of these as directly addressed to their own reasoning powers. Nevertheless, a few marks, indelibly made by these earlier usages, were left for a long time afterwards in our law. The summoning of attesting witnesses to prove a document, the quantitative effect of an oath, the conclusiveness of a seal in fixing the terms of a documentary transaction, the necessary production of the original of a document — these rules all trace a continuous existence back to this earliest time, although they later took on different forms and survived for reasons not at all connected with their primitive theories.

(2) A. D. 1200–1500. With the full advent of the jury, in the 1200s, the general surroundings of the modern system are prepared; for now the tribunal is to determine out of its own conscious persuasion of the facts, and not merely by supervising external tests. The change is of course gradual; and trial by jury is as yet only one of several competing methods; but at least a system for the process of persuasion becomes possible. In this period, no new specific rules seem to have sprung up. The practice for attesting witnesses, oaths, and documentary originals is developed. The rule for the conclusiveness of a sealed writing is definitely established. But during these three centuries the general process of pleading and procedure is only gradually differentiated from that of proof,— chiefly because the jurors are as yet relied upon to furnish in themselves both knowledge and decision; for they are not commonly caused to be informed by witnesses, in the modern sense.

(3) A. D. 1500–1700. By the 1500s, the constant employment of witnesses, as the jury's chief source of information, brings about

a radical change. Here enter, very directly, the possibilities of our modern system. With all the emphasis gradually cast upon the witnesses, their words and their documents, the whole question of admissibility arises. One first great consequence is the struggle between the numerical or quantitative system, which characterized the canon law and still dominated all other methods of proof, and the unfettered, systemless jury trial; and it was not for two centuries that the numerical system was finally repulsed. Another cardinal question now necessarily faced was that of the competency of witnesses; and by the end of the 1500s, the foundations were laid for all the rules of disqualification which prevailed thenceforward for more than two centuries, and in part still remain. At the same time, and chiefly from a simple failure to differentiate, most of the rules of privilege and privileged communication were thereby brought into existence, at least in embryo. The rule for attorneys, which alone stood upon its own ground, also belongs here, though its reasons were newly conceived after the lapse of a century. A third great principle, the right to have compulsory attendance of witnesses, marks the very beginning of this period. Under the primitive notions, this all rested upon the voluntary action of one's partisans; the calling of compurgators and documentary attestors, under the older methods of trial, was in effect, a matter of contract. But as soon as the chief reliance came to be the witnesses to the jurors, and the latter ceased to act on their own knowledge, the necessity for the provision of such information, compulsorily if not otherwise, became immediately obvious. The idea progressed slowly; it was enforced first for the Crown, next for civil parties; and not until the next period was it conceded to accused persons. Thus was laid down indirectly the general principle that there is no privilege to refuse to be a witness; to which the other rules, above mentioned, subsequently became contrasted as exceptions. A fourth important principle, wholly independent in origin, here also arose and became fixed by the end of this period,— the privilege against self-crimination. The creature, under another form, of the canon law, in which it had a long history of its own, it was transferred, under stress of political turmoil, into the common law, and thus, by a singular contrast, came to be a most distinctive feature of our trial system. About the same period — the end of the 1600s — an equally distinctive feature, the rule against using an accused's character, became settled. Finally, the "parol evidence" rule enlarged its

scope, and came to include all writings and not merely sealed documents; this development, and the enactment of the statute of frauds and perjuries, represent a special phase of thought in the end of this period. It ends, however, rather with the Restoration of 1660 than with the Revolution of 1688, or the last years of the century; for the notable feature of it is that the regenerating results of the struggle against the arbitrary methods of James I and Charles I began to be felt as early as the return of Charles II. The mark of the new period is seen at the Restoration. Justice, on all hands, then begins to mend. Crudities which Matthew Hale permitted, under the Commonwealth, Scroggs refused, under James II. The privilege against self-crimination, the rule for two witnesses in treason, and the character rule — three landmarks of our law of evidence — find their first full recognition in the last days of the Stuarts.

(4) A. D. 1700–1790. Two circumstances now contributed independently to a further development of the law on two opposite sides, its philosophy and its practical efficiency. On the one hand the final establishment of the right of cross-examination by counsel, at the beginning of the 1700s, gave to our law of evidence the distinction of possessing the most efficacious expedient ever invented for the extraction of truth (although, to be sure, like torture,— that great instrument of the continental system,— it is almost equally powerful for the creation of false impressions). A notable consequence was that by the multiplication of oral interrogation at trials the rules of evidence were now developed in detail upon such topics as naturally came into new prominence. All through the 1700s this expansion proceeded, though slowly. On the other hand, the already existing material began now to be treated in doctrinal form. The first treatise on the law of evidence was that of Chief Baron Gilbert, not published till after his death in 1726. About the same time the abridgments of Bacon and of Comyns gave many pages to the title of Evidence; but no other treatise appeared for a quarter of a century, when the notes of Mr. J. Bathurst (later, Lord Chancellor) were printed, under the significant title of the "Theory of Evidence." But this propounding of a system was as yet chiefly the natural culmination of the prior century's work, and was independent of the expansion of practice now going on. In Gilbert's book, for example, even in the fifth edition of 1788, there are in all, out of the three hundred pages, less than five concerned with the new topics brought up by the

practice of cross-examination; in Bathurst's treatise (by this time embodied in his nephew Buller's "Trials at Nisi Prius") the number is hardly more; Blackstone's Commentaries, in 1768, otherwise so full, are here equally barren. The most notable result of these disquisitions, on the theoretical side, was the establishment of the "best evidence" doctrine, which dominated the law for nearly a century later. But this very doctrine tended to preserve a general consciousness of the supposed simplicity and narrowness of compass of the law of evidence. As late as the very end of the century, Mr. Burke could argue down the rules of evidence when attempted to be enforced upon the House of Lords at Warren Hastings' trial, and ridicule them as petty and inconsiderable. But, none the less, the practice had materially expanded during his lifetime. In this period, besides the rules for impeachment and corroboration of witnesses (which were due chiefly to the development of cross-examination), are to be reckoned also the origins of the rules for confessions, for leading questions, and for the order of testimony. The various principles affecting documents — such as the authorization of certified (or office) copies and the conditions dispensing from the production of originals — now also received their general and final shape.

(5) A. D. 1790–1830. The full spring-tide of the system had now arrived. In the ensuing generation the established principles began to be developed into rules and precedents of minutiae relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centering around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain; it was the increase of printed reports of Nisi Prius rulings. This was at first the cause, and afterwards the self-multiplying effect, of the detailed development of the rules. Hitherto, upon countless details, the practice had varied greatly on the different circuits; moreover, it had rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges. In both respects it therefore lacked fixity, and was not amenable to tangible authority. These qualities it now rapidly gained. As soon as Nisi Prius reports multiplied and became available to all, the circuits must be reconciled, the rulings once made and recorded must be followed, and these precedents must be open to the entire profession to be invoked. There was, so to speak,

a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and McNally, for Ireland (1802), printed small volumes whose contents, as compared with those of Gilbert and Buller, seem to represent almost a different system, so novel were their topics. In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch-making; and its author in a later time once quietly complained that its pages were "more often quoted than acknowleded." The room for new treatises was rapidly enlarging. Peake and McNally, as handbooks of practice, were out of date within a few years, and no new editions could cure them. In 1814, and then in 1824, came Phillipps, and Starkie, — in method combining Evans' philosophy with Peake's strict reflection of the details of practice. There was now indeed a system of evidence, consciously and fully realized. Across the water a similar stage had been reached. By a natural interval Peake's treatise was balanced, in 1810, by Swift's Connecticut book, while Phillipps and Starkie (after a period of sufficiency under American annotations) were replaced by Greenleaf's treatise of 1842.

(6) A. D. 1830–1860. Meantime, the advance of consequences was proceeding, by action and reaction. The treatises of Peake and Phillipps, by embodying in print the system as it existed, at the same time exposed it to the light of criticism. It contained, naturally enough, much that was merely inherited and traditional, much that was outgrown and outworn. The very efforts to supply explicit reasons for all this made it the easier to puncture the insufficient reasons and to impale the inconsistent ones. This became the office of Bentham. Beginning with the first publication, in French, of his Theory of Judicial Evidence, in 1818, the influence of his thought upon the law of evidence gradually became supreme. While time has only ultimately vindicated and accepted most of his ideas (then but chimeras) for other practical reforms, and though some still remain untried, the results of his proposals in this department began almost immediately to be achieved. Mature experience constantly inclines us to believe that the best results on human action are seldom accomplished by sarcasm and invective; for the old fable of the genial sun and the raging wind repeats itself. But Bentham's case must always stand out as a proof that

sometimes the contrary is true, — if conditions are meet. No one can say how long our law might have waited for regeneration, if Bentham's diatribes had not lashed the community into a sense of its shortcomings. It is true that he was particularly favored by circumstances in two material respects — the one personal, the other broadly social. He gained, among others, two incomparable disciples, who served as a fulcrum from which his lever could operate directly upon legislation. Henry Brougham and Thomas Denman combined with singular felicity the qualities of leadership in the technical arts of their profession and of energy for the abstract principles of progress. Holding the highest offices of justice, and working through a succession of decades, they were enabled, within a generation, to bring Bentham's ideas directly into influence upon the law. One who reads the great speech of Brougham, on February 7, 1828, on the state of the common law courts, and the reports of Denman and his colleagues, in 1852 and 1853, on the common law procedure, is perusing epoch-making deliverances of the century. The other circumstance that favored Bentham's causes was the radical readiness of the times. The French Revolution had acted in England; and as soon as the Napoleonic wars were over, the influence began to be felt. One part of public opinion was convinced that there must be a radical change; the other and dominant part felt assured that if the change did not come as reform, it would come as revolution; and so the reform was given, to prevent the revolution. In a sense, it did not much matter to them where the reform came about — in the economic, or the political, or the juridical field — if only there was reform. At this stage, Bentham's denouncing voice concentrated attention on the subject of public justice — criminal law and civil procedure; and so it was here that the movement was felt among the first. As a matter of chronological order, the first considerable achievements were in the field of criminal law, beginning in 1820, under Romilly and Mackintosh; then came the political upheaval of the Reform Bill, in 1832, under Russell and Grey; next, the economic regeneration, beginning with Huskisson and culminating with Peel in the Corn Law Repeal of 1846. Not until the Common Law Procedure Acts of 1852 and 1854 were large and final results achieved for the Benthamic ideas in procedure and evidence. But over the whole preceding twenty years had been spread initial and instructive reforms. Brougham's speech of February 7, 1828, was the real signal for the beginning of this epoch — a beginning which

would doubtless have culminated more rapidly if urgent economic and political crises had not intervened to absorb the legislative energy.

In the United States, the counterpart of this period came only a little later. It seems to have begun all along the line, and was doubtless inspired by the accounts of progress made and making in England, as well as by the legislative efforts of David Dudley Field, in the realm of civil procedure. The period from 1840 to 1870 saw the enactment, in the various jurisdictions in this country, of most of the reformatory legislation which had been carried or proposed in England.

(7) A. D. 1860. After the Judicature Act of 1875, and the Rules of Court (of 1883) which under its authority were formulated, the law of evidence in England attained rest. It is still overpatched and disfigured with multiplicitous fragmentary statutes, especially for documentary evidence. But it seems to be harmonious with the present demands of justice, and above all to be so certain and settled in its acceptance that no further detailed development is called for. It is a substratum of the law which comes to light only rarely in the judicial rulings upon practice.

Far otherwise in this country. The latest period in the development of the law of evidence is marked by a temporary degeneracy. Down to about 1870, the established principles, both of common law rules and of statutory reforms, were re-stated by our judiciary in a long series of opinions which, for careful and copious reasoning, and for the common sense of experience, were superior (on the whole) to the judgments uttered in the native home of our law. Partly because of the lack of treatises and even of reports — partly because of the tendency to question imported rules and therefore to defend on grounds of principle and policy whatever could be defended — partly because of the moral obligation of the judiciary, in new communities, to vindicate by intellectual effort its right to supremacy over the bar — and partly also because of the advent, coincidentally, of the same rationalizing spirit which led to the reformatory legislation — this very necessity of restatement led to the elaboration of a finely reasoned system. The "mint, anise and cummin" of mere precedent were not unduly revered. There was always a reason given — even though it might not always be a worthy reason. The pronouncement of Bentham came near to be exemplified, that "so far as evidence is concerned, the English practice needs no improvement but from its own stores.

Consistency, consistency, is the one thing needful. Preserve consistency, and perfection is accomplished."

But the newest States in time came to be added. New reports spawned a multifarious mass of new rulings in fifty jurisdictions — each having theoretically an equal claim to consideration. The liberal spirit of choosing and testing the better rule degenerated into a spirit of empiric eclecticism in which all things could be questioned and re-questioned *ad infinitum*. The partisan spirit of the bar, contesting desperately on each trifle, and the unjust doctrine of new trials, tempting counsel to push up to the appellate courts upon every ruling of evidence, increased this tendency. Added to this was the supposed necessity in the newer jurisdictions of deciding over again all the details that had been long settled in the older ones. Here the lack of local traditions at the bar and of self-confidence on the bench led to the tedious re-exposition of countless elementary rules. This lack of peremptoriness on the supreme bench, and (no less important) the marked separation of personality between courts of trial and courts of final decision, led also to the multifarious heaping up, within each jurisdiction, of rulings upon rulings involving identical points of decision. This last phenomenon may be due to many subtly conspiring causes. But at any rate, the fact is that in numerous instances, and in almost every jurisdiction, recorded decisions of Supreme Courts upon precisely the same rule and the same application of it can be reckoned by the dozens and scores. This wholly abnormal state of things — in clear contrast to that of the modern English epoch — is the marked feature of the present period of development in our own country.

Of the change that is next to come, and of the period of its arrival, there seem as yet to be no certain signs. Probably it will come either in the direction of the present English practice — by slow formation of professional habits — or in the direction of attempted legislative relief from the mass of bewildering judicial rulings — by a concise code. The former alone might suffice. But the latter will be a false and futile step, unless it is founded upon the former; and in any event the danger is that it will be premature. A code fixes error as well as truth. No code can be worth casting, until there has been more explicit discussion of the reasons for the rules and more study of them from the point of view of synthesis and classification. The time must first come when, in the common understanding and acceptance of the

profession, "every rule is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated, or are ready to be stated, in words."

(*h*) *The Supremacy of Law* [1]

DICEY, LAW OF THE CONSTITUTION, 171.

Two features have at all times since the Norman Conquest characterized the political institutions of England.

The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and the maintainer of order. The maxim of the Courts, *tout fuit in luy et vient de lui al commencement*, was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.

The second of these features, which is closely connected with the first, is the rule or supremacy of law. This peculiarity of our polity is well expressed in the old saw of the Courts, "*La ley est le plus haute inheritance, que le roy ad; car par la ley il meme et toutes ses sujets sont rules, et si la ley ne fuit, nul roi, et nul inheritance sera.*"

In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, are as responsible for any act which the law does not authorize as is any private and unofficial

[1] Dicey, Law of the Constitution, chap. IV; Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, Legal Essays, pp. 1–41; Coxe, Judicial Power and Unconstitutional Legislation, chaps. XV–XXVIII; McIlwain, The High Court of Parliament and Its Supremacy, chap. IV.

person. Officials, such for example as soldiers or clergymen of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow-countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact is in no way inconsistent with the principle that all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.

An Englishman naturally imagines that the rule of law (in the sense in which we are now using the term) is a trait common to all civilized societies. But this supposition is erroneous. Most European nations had indeed, by the end of the eighteenth century, passed through that stage of development (from which England emerged before the end of the sixteenth century) when nobles, priests and others could defy the law. But it is even now far from universally true that in continental countries all persons are subject to one and the same law, or that the Courts are supreme throughout the state. If we take France as a type of continental state, we may assert, with substantial accuracy, that officials, under which word should be included all persons in public service, are in their official capacity, protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject in many respects only to official law administered by official bodies.

MAGNA CARTA (1215, reissued in 1216, 1217, 1225).

Cap. XIV. A free man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; and a merchant likewise, saving to him his merchandise and any other's villein than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. Earls and barons shall not be amerced but by their peers, and after the manner of their offence. No man of the church shall be amerced after the quantity of his spiritual benefice, but after his lay-tenement, and after the quantity of his offence.

Cap. XIX. No constable nor his baliff, shall take corn or other chattels of any man, if he be not of the town where the castle is,

but he shall forthwith pay for same unless that the will of the seller was to respite the payment; and if he be of the same town, the price shall be paid unto him within forty days.

Cap. XXI. No sheriff nor bailiff of ours, or any other shall take horses or carts of any man to make carriage, except he pay the old price limited, that is to say, for carriage with two horse, x d. a day; for three horse xiv d. a day. No demesne cart of any spiritual person or knight, or any lord, shall be taken by our bailiffs; nor we, nor our bailiffs, nor any other, shall take any man's wood for our castles, or other our necessaries to be done, but by the license of him whose the wood is.

Cap. XXIX. No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

Extracts from COKE'S SECOND INSTITUTE. [These extracts are from Lord Coke's Commentary on Cap. XXIX of Magna Carta.]

"No man shall be taken (that is) restrained of liberty, by petition or suggestion to the king or to his councell, unless it be by indictment or presentment of good and lawfull men, where such deeds be done."

"No man shall be disseised, etc."

Hereby is intended that lands, tenements, goods and chattels shall not be seized into the king's hands, contrary to this great charter, and the law of the land: nor shall any man be disseised of his lands or tenements or dispossessed of his goods and chattels contrary to the law of the land.

A custom was alleged in the town of C, that if the tenant cease by two years, that the lord should enter into the freehold of the tenant, and hold the same untill he were satisfied of the arrearages, and it was adjudged a custom against the law of the land, to enter into a man's freehold in that case without action or answer.

"No man destroyed," etc.

That is, fore-judged of life or limb, disinherited, or put to torture or death.

Every oppression against law, by colour of any usurped authority, is a kind of destruction, for, *quando aliquid prohibetur, et omne,*

per quod debitur ad illud: and it is the worse oppression, that is done by colour of justice.

"But by the law of the land." For the true sense and exposition of these words see the statute of 37 E. 3, cap. 8 [*i.e.*, 37th year of Edw. III] where the words by the law of the land are rendered without due process of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned or put out of his freehold, without process of the law: that is by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law.

Without being brought in to answere but by due process of the common law.

No man be put to answer without presentment before justices or thing of record, or by due process, or by writ originall, according to the old law of the land.

Wherein it is to be observed, that this chapter is but declaratory of the old law of England.

[Lord Coke then explains under what circumstances a man may be arrested and imprisoned lawfully; what warrant he who makes the arrest must have; if a writ is required, what it shall contain, and proceeds:]

Imprisonment doth not only extend to false imprisonment, and unjust; but for detaining of the prisoner longer than he ought, where he was at the first lawfully imprisoned.

If the King's writ comes to the sheriffe, to deliver the prisoner, if he detains him, this detaining is an imprisonment against the law of the land.

If the sheriffe or gaoler detain a prisoner in the gaole after his acquitall unless it be for his fees, this is false imprisonment.

Now it may be demanded, if a man be taken, or committed to prison *contra legem terrae*, against the law of the land, what remedy hath the party grieved? To this it is answered: first, that every act of parliament, made against any injury, mischiefe, or grievance, doth either expressly or implicitly give a remedy to the party wronged, or grieved; as in many of the chapters of this great charter appeareth; and therefore he may have an action grounded upon this great charter.

2. He may cause him to be indicted upon this statute at the king's suit.

3. He may have an *habeas corpus* out of the king's bench or chancery, though there be no privilege, etc., or in the court of

common pleas or of exchequer for any officer or privileged person there; upon which writ the gaoler must retourne by whom he was committed, and the cause of his imprisonment, and if it appeareth that his imprisonment be just and lawfull, he shall be remanded to the former gaoler, but if it shall appeare to the court that he was imprisoned against the law of the land, they ought by force of this statute to deliver him; if it be doubtfull and under consideration he may be bailed.

4. He may have action of false imprisonment.
5. He may have a writ *de homine replegiando.*

ANONYMOUS CASE, COURT OF KING'S BENCH, 1338. (Y. B. Mich. 12 Edw. III., No. 23.)

In a replevin where the defendant avowed the distress [*i.e.*, seizure of property] for the cause that he was made collector of the fifteenths, etc., and did not show a warrant. Whereupon the plaintiff demanded judgment whether he ought to be received to that avowry without a specialty. It was said that he was sub-collector and had to make an oath, and that he would not have any other warrant. Shareshull (J.) said that he could not by law be driven to act in that capacity without a special warrant, and that if he were arrested on that account, he would have a writ of false imprisonment. (Pike's translation.)

REGINALD DE NERFORD'S CASE, COURT OF KING'S BENCH, 1339–40. (Y. B. Hil. 11 Edw. III., No. 34).

Note. Reginald de Nerford and others were convicted as disseisors with force and arms wherefore an *exegi facias* issued, which writ the sheriff returned to the effect that the king had instructed him by letter under the Targe that he had pardoned them their trespasses and the imprisonment, and commanded that they should not be put to damage on that account, and so by reason of the king's message he had done nothing, and he returned the king's letter.

Willoughby, J.: The letter should have been sent to us, and then we should have commanded the sheriff to stay proceedings; but the sheriff could not legally by virtue of any such letter have stayed proceedings otherwise than by warrant from the same place from which he had the order to outlaw. Wherefore the sheriff was in mercy [*i.e.*, was fined] and a fresh *exegi facias* issued. (Pike's translation.)

FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE, chap. 9.

A King of England cannot, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal he would have a power to make what innovations and alterations he pleased, in the laws of the kingdom, impose tallages and other hardships upon the people, whether they would or no, without their consent, which sort of government the civil laws point out, when they declare *Quod principi placuit legis habet vigorem:* but it is much otherwise with a king, whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subject, nor burthen them, against their wills, with strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely and without the hazard of being deprived of them, either by the king or any other. (Amos's translation.)

THE PRIOR OF CASTLEACRE v. THE DEAN OF ST. STEPHENS, COMMON PLEAS, 1506 (Y. B. 21 H. 7, 1).

Kingsmill, J.: But, sir, the act of Parliament cannot make the king to be parson, for we through our law cannot make any temporal man to have spiritual jurisdiction; for nothing can do that except the supreme head.

Palmes (*arguendo* upon reargument): Through the act of Parliament it seems the king cannot be called parson, for no temporal act can make temporal man have spiritual jurisdiction. For if it was ordained through act etc., that such a one should not offer tithes to his curate, the act would be void, for of such thing as touches only the spiritualty, such temporal act can make no ordinance. The law is the same if it were enacted that a parson should have the tithes of another. So by this act which is only of a temporal court, the king cannot be made to have any spiritual jurisdiction.

Fisher, J.: And the king cannot be parson by this act of Parliament, nor can any temporal man through this act be called parson.

Frowicke, C. J.: As to the other matter, whether the king can be parson by the act of Parliament, as I understand it there is not much to argue. For I have not seen that any temporal man can be parson without the agreement of the supreme head. And in all the cases that have been put, namely of the benefices in Wales and the benefices that laymen have to their own use, I have looked

into the matter. The king had them by assent and agreement of the supreme head. So a temporal act without the assent of the supreme head cannot make the king parson.

DARCY v. ALLEN, COURT OF KING'S BENCH, 1603. (Moore, 671.)

In the King's Bench: an action on the case; and a count that, whereas men of mean trades and occupations in the commonwealth apply themselves to idle games with cards, the queen, by way of redress and restraint of this enormity, made letters patent to Ralph Bowes, authorizing him and his factors and deputies to provide playing cards, and prohibiting all others to import playing cards into the realm or to make or sell them in the realm for a certain term of years now expired, and [reciting the grant] she made another like grant to Darcy, who provided cards accordingly; yet the defendant brought cards into the realm and sold them and did things contrary to the privilege granted to the plaintiff, and to his damage to the amount of £2,000. The defendant pleaded the customs of London that a freeman may buy and sell all things merchantable, and that, since he was a freeman and haberdasher of London, and cards were things merchantable, he bought and sold them; and he demanded judgment. The plaintiff demurred in law. . . . Afterwards, Mich. 44 and 45 Eliz. (1602) it was argued by Dodderidge, against the patent, and by Fleming, solicitor, with the patent; and afterwards, the same term, by Fuller, against the patent, and Coke, Attorney General, with the Patent. And Dodderidge said that the case was tender, concerning the prince's prerogative and the subject's liberty and must be argued with much caution; for he that hews above his head chips will fall into his eyes, and *qui majestatem scrutatur principis opprimetur splendore ejus.* Yet since it is the honor and safety of the prince to govern by the laws . . . therefore the princes of this realm have always been content that their patents and grants should be examined by the laws, and so is her Majesty that now is. In this examination it has always been held that the queen's grants procured against the usual and settled liberty of the subjects are void, and also those which tend to their grievance and oppression.

It was resolved by Popham, Chief Justice, *et per totam curiam,* that the said grant to the plaintiff of the sole making of cards within the realm was utterly void, and that for two reasons: 1. That it is a monopoly and against the common law. 2. That it is against divers Acts of Parliament. (Thayer's translation.)

CONFERENCE BETWEEN KING JAMES I. AND THE JUDGES OF ENGLAND, 1612. (12 Rep. 63.)

Note: Upon Sunday, the 10th of November of this same term, the king, upon complaint made to him by Bancroft, Archbishop of Canterbury, concerning prohibitions, was informed that when the question was made of what matters the ecclesiastical Judges have cognizance, either upon the opposition of the statute concerning tithes, or any other thing ecclesiastical, or upon the statute i El. concerning the high commission, or in any other case in which there is not express authority in law, the King himself may decide it in his royal person; and that the Judges are but the delegates of the king, and that the king may take what causes he shall please to determine from the determination of the Judges, and may determine them himself. And the Archbishop said that this was clear in divinity that such authority belongs to the king by the word of God in the scripture. To which it was answered by me in the presence and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal as treason, felony, &c. or betwixt party and party concerning his inheritance, chattels or goods, &c., but this ought to be determined and adjudged in some court of justice, according to the law and custom of England, and always judgments are given, *ideo consideratum est per curiam* so that the court gives the judgment; and the King hath his court viz: in the upper house of Parliament, in which he with his lords is the supreme Judge over all other judges; for if error be in the Common Pleas, that may be reversed in the King's Bench; and if the court of King's Bench err, that may be reversed in the upper house of Parliament, by the King with the assent of the Lords spiritual and temporal, without the Commons, in this respect the King is called Chief Justice, and it appears in our books that the King may sit in the Star Chamber, but this was to consult with the Justices upon certain questions proposed to them, and not *in judicio;* so in the King's Bench he may sit, but the court gives the judgment; and it is commonly said in our books that the king is always present in the court in judgment of law, but upon this he cannot be nonsuit; but the judgments are always given *per curiam;* and the Judges are sworn to execute justice according to law and the custom of England. And it appears by the Act of Parliament of 2 Ed. 3 cap. 9, 2 Ed. 3 cap. 1, that neither by the great seal nor by the little seal justice shall be delayed; *ergo*, the king cannot take any

cause out of any of his Courts, and give judgment upon it himself, but in his own cause he may stay it, it as it doth appear. 11 H. 4 8. And the judges informed the King that no King after the Conquest assumed to himself to give any judgment in any cause whatever, which concerned the administration of justice within this realm, but these were solely determined by the courts of justice: and the king cannot arrest any man, as the book is in 1 H. 7. 4. for the party cannot have remedy against the King: so if the King give any judgment what remedy can the party have? Vide 39 Ed. 3 one who had a judgment reversed before the council of state; it was held utterly void, for that it was not a place where judgment may be reversed. Vide 1 H. 7. 4. Hussey, Chief Justice, who was Attorney to Ed. 4. reports that Sir John Markham, Chief Justice, said to King Edw. 4 that the King cannot arrest a man for suspicion of treason or felony, as others of his lieges may; for that if it be wrong to the party grieved, he can have no remedy; and it was greatly marvelled that the Archbishop durst inform the King that such absolute power and authority as is aforesaid belonged to the King by Word of God. Vide 4 H. 4 Cap. 22, which being translated into Latin, the effect is, *judicia in curia Regs reddita non annihiletur, sed stet judicium in suo robore quosque per judicium curiae Regis tanquam erroneum*, &c. Vide West 2 cap. 5. Vide le stat. de Marlbridge, Cap. 1. *Provisum est concordatum, et concessum, quod tam majores quam minores iustitiam habeant et recipiant in curia domini Regis, et vide* le stat. de Magna Carta, cap. 29, 25 Ed. 3. cap. 5. None may be taken by petition or suggestion made to our lord the King or his council, unless by judgment: and 43 Ed. 3. cap. 3, no man shall be put to answer without presentment before the Justices, matter of record, or by due proofs, or by writ original according to the ancient law of the land: and if anything be done against it, it shall be void in law and held for error. Vide 28 Ed. 3. c. 3. 37 Ed. 3. cap. 18. Vide 17 R. 2. *ex rotulis Parliamenti in Turri*, art. 10. A controversy of land between parties was heard by the king, and sentence given, which was repealed, for this, that it did belong to the common law. Then the King said that he thought the law was founded upon reason, and that he and others had reason as well as the judges: to which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects,

are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it; and that the law was the golden met wand and measure to try the causes of the subjects and which protected his Majesty in safety and peace; with which the King was greatly offended and said that then he should be under the law, which was treason to affirm, as he said: to which I said that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege.* [Coke who was Chief Justice and spokesman of the judges is reporting this.]

DEN d. BAYARD v. SINGLETON, COURT OF CONFERENCE OF NORTH CAROLINA, 1787. (1 Martin, N. C. 42.)

Ejectment. This action was brought for the recovery of a valuable house and lot, with a wharf and other appurtenances, situate in the town of Newbern.

The defendant pleaded *Not guilty*, under the common rule.

He held under a title derived from the State, by a deed, from a Superintendent Commissioner of confiscated estates.

At May Term, 1786, Nash, for the defendant, moved that the suit be dismissed, according to an Act of the last session, entitled an Act to secure and quiet in their possession all such persons, their heirs and assigns, who have purchased or may hereafter purchase lands and tenements, goods and chattels, which have been sold or may hereafter be sold by commissioners of forefeited estates, legally appointed for that purpose, 1785, 7, 553.

The Act requires the courts, in all cases where the defendant makes affidavit that he holds the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion.

The defendant had filed an affidavit, setting forth that the property in dispute had been confiscated and sold by the commissioner of the district.

This brought on long arguments from the counsel on each side, on constitutional points.

. . . . . .

At May Term, 1787, Nash's motion was resumed, and produced a very lengthy debate from the Bar.

Whereupon the court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant

the uncertainty that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present Act (which would probably happen sooner or later), suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect.

. . . . . .

The court, then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously, for overruling the aforementioned motion for the dismission of the said suits.

In the course of which the judges observed, that the obligation of their oaths, and the duty of their office required them, in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.

That they therefore were bound to declare that they considered, that whatever disabilities the persons under whom the plaintiffs were said to derive their titles, might justly have incurred, against their maintaining or prosecuting any suits in the courts of this State; yet that such disabilities in their nature were merely personal, and not by any means capable of being transferred to the present plaintiffs, either by descent or purchase; and that these plaintiffs, being citizens of one of the United States, are citizens of this State, by the confederation of all the States; which is to be taken as a part of the law of the land, unrepealable by any Act of the General Assembly.

That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all; that if the members of the General Assembly

could do this, they might with equal authority, not only render themselves the legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no Act they could pass, could by any means repeal or alter the Constitution, because, if they could do this, they would at the same instant of time destroy their own existence as a legislature, and dissolve the government thereby established. Consequently the Constitution (which the judicial power was bound to take notice of as much as of any other law whatever), standing in full force as the fundamental law of the land, notwithstanding the Act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.

Nash's motion was overruled.

3. THE DEVELOPMENT OF EQUITY [1]

MAINE, ANCIENT LAW, 23, 27.

A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or other of them. But I know of no instance in which the order of their appearance has been changed or inverted.

The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity, whether of the Roman Praetors or of the English Chancellors differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement

[1] Maitland, Equity, Lectures I and II; Kerly, History of Equity; Spence, History of the Equitable Jurisdiction of the Court of Chancery (2 vols).

which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law, and demanding application independently of the consent of any external body, belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

Extracts from COKE'S FOURTH INSTITUTE (written in the reign of James I.).

In chancery are two courts, one ordinary, *coram domino rege in cancellaria*, wherein the lord Chancellor or lord keeper of the great seale proceeds according to the right line of the laws and statutes of the realm, *secundum legem et consuetudinem Angliae*. Another extraordinary, according to the rule of equity, *secundum aequum et bonum*. And first of the former court. He hath power to hold plea of *scire fac'*[1] for repeal of the King's letters patents, of petitions, of *monstrans de droits*,[2] traverse of offices,[3] partitions in chancery, of *scire fac.'* upon recognizances in this court, writs of *audita querela* and *scire fac'* in the nature of an *audita querela*[4] to avoid executions in this court, . . . and all personal actions by or against any officer or minister of that court in respect of their service or attendance therein.

This court is *officina justitiae*, out of which all originall writs and all commissions which pass under the great seale go forth, which great seal is *clavis regni*, and for those ends this court is ever open.

Having spoken of the court of ordinary jurisdiction, it followeth according to our former division, that we speak of the extraordinary proceeding, according to the rule of equity, *secundum aequum et bonum*. . . .

Albeit our ancient authors, the Mirrour, Glanvill, Britton and Fleta doe treat of the former Court in Chancery, and of originall writs and commissions issuing out of the same, yet none of them

[1] *Scire facias*, order to show cause.

[2] Showing of right. A proceeding to obtain relief against the crown.

[3] Proceedings to recover property of which the crown has taken possession on escheat or forfeiture.

[4] Proceedings for relief against a judgment by reason of subsequent events operating as a discharge.

do once mention this court of equity. We have also considered what cases in this court of equity have been reported in our books, and we find none before the reign of H. 6, and in that king's time and afterward plentifully.

GOODWIN, THE EQUITY OF THE KING'S COURT BEFORE THE REIGN OF EDWARD I., 12.

If it would seem to be true that Glanvill and Bracton borrow their conception of equity from the *aequitas* of the Roman law, they are, nevertheless, but applying new terms to an institution as essentially Teutonic as Roman. In the early Germanic State, the king exercised a jurisdiction based on broader principles of right and justice than that of the ordinary tribunals; he was not in a like degree bound down to the formality of the law and could decide the case before his court according to principles of equity. The Frankish king of the Merovingian period granted to those whom he had taken into his special protection a writ containing the privilege of withdrawing their suits from the local courts in favor of the king's court, there to be decided *secundum aequitatem*. In the Carolingian period, the man who had suffered from the strictness and formality of the ordinary court, might seek alleviation (*moderatio*) from the king. . . . Although the Roman law, which reserved the exercise of equity for the *consistorium principis*, may well have had its influence on the court of the Frankish kings, nevertheless, as Professor Brunner clearly points out, the fact that the same equitable jurisdiction existed in Anglo-Saxon England, in Iceland, and in Sweden, proves its origin as a Germanic as well as a Roman institution.

From the SECULAR ORDINANCE OF EDGAR (959–975).

Cap. 2. And let no one apply to the king in any suit, unless he at home may not be worthy of law or cannot obtain law. If the law be too heavy, let him seek a mitigation of it from the king; and for any bot-worthy crime, let no man forfeit more than his wer.

MITFORD, PLEADINGS IN CHANCERY (2 ed. 1787), 6.

A suit to the extraordinary jurisdiction of the court of chancery, on behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition, to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal; or to the king himself in his court of chancery, in case the person holding the

seal is a party, or the seal is in the king's hands. But if the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection as the objects of a public charity, the matter of complaint is offered to the court by way of information, given by the proper officer, and not by petition. Except in some few instances, bills and informations have always been in the English language; and a suit preferred in this manner in the court of chancery has been therefore commonly termed a suit by English bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, which, till the statute of 4 Geo. II, c. 26 (1730), were entered and enrolled, more anciently in the French or Norman tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

WILLIAM DODD v. JOHN BROWNING ET AL. Temp. Henry V. Calendars of Proceedings in Chancery, I, xiii. (This is the plaintiff's bill.)

To my worthy and gracious Lord Bishope of Wynchester, Chancellor of Yngelonde:

Beseching mekely youre povre bedeman William Dodde, charyotr, whech passed overe the see in service wt our liege lorde and was oon of his charioterys in his viages; & of his treste ffefed in my land Johan Brownyng and Johan . . . hull of Chekewell wt my wyfe, whech Johan & Johan after azenst my will & wetynge pot my land to ferme, and delyvered my mevable good the valewe of xx marke where hem leste; & thus they kepe my dede & the dentre wt my mevable good unto myne undoynge; also whech am undo for brusinge in service of our liege lorde, & in service of yt worthy Princesse my lady of Clarence & ever wolde yef my lemys might serve worthy prince sone. At reverence of God and of that pereless Princes his moder, take this matre at hert of alms and charitie.

MARGARET APPILGARTH v. THOMAS SERGEANTSON. Temp. Henry VI. (1439). Calendars of Proceedings in Chancery, I, xli. (This is the plaintiff's bill.)

To the right reverent Fadre in God, the Bisshop of Bathe, Chaunceller of England.

Besecheth mekely Margaret Appilgarth of York wydewe, that where Thomas Sergeantson of the same, at divers times spak to yor saide besecher ful sadly and hertly in hir conceit, and sought

upon hir to have hir to wyfe, desiring to have of hir certain golde to the some of xxxvj li. for costes to bee made of their mariage, & to emploie in marchandise to his encrese & profit as to hir husbande. Whereuppon she havyng ful byleve & trust in his trouthe & langage, nor desiring of him eeny contract of matrymoyne, delivered him the saide some at diverse tymes; aftre the which liveree furthwith he nat willing to relivere the saide some to yor saide bisechere hathe take to wyfe an othre woman, in grete deceit, hurt & uttre undooyng of hir, without yor gracieux help & socor in this partie. Please it to yor good grace to considre the premisses, and that yor saide bisechere no remedy hath by the comone lawe to get ageine the saide some; & ther upon to graunte a writ ageins the said Thomas to appere afore you at a certaine day upon a certaine peyne by you to bee lymit, to bee examined upon the premisses; & ther upon make him to doo as good feith & consciens wol in this partie. And she shall pray God for you.

ANONYMOUS CASE, COURT OF COMMON PLEAS, 1465. (Y. B. 4 E. IV., 8, 9.) Digby's translation.

[Action of trespass *quare clausum fregit.* The defendant pleaded that plaintiff held the land to his use. Plaintiff demurred.]

Catesby (counsel for defendant): Wherefore should the defendant not avail himself of this matter, when it follows by reason that the defendant enfeoffed the plaintiff to the use of the defendant, and so that the plaintiff is only in the land to the use of the defendant and the defendant made the feoffment to the plaintiff in trust and confidence? And the plaintiff suffered the defendant to occupy the land, so that by reason that the defendant occupied the land at his will, this proves that the defendant shall have the advantage of this feoffment in trust, in order to justify his occupation of the land by this cause &c.

Moile (J.): This is a good ground of defence in Chancery, for the defendant there shall aver the intent and purpose upon such a feoffment, for in the Chancery a man shall have remedy according to conscience upon the intent of such a feoffment, but here by the course of the common law in the Common Pleas or King's Bench it is otherwise, for the feoffee shall have the land; and the feoffor shall not justify contrary to his own feoffment, that the said feoffment was made in confidence, or the contrary.

Catesby: The law of Chancery is the common law of the land, and there the defendant shall have advantage of this matter and

feoffment; wherefore then shall he not have it in the same manner here?

Moile (J.): That cannot be so here in this court, as I have already said, for the common law of the land is different from the law of Chancery on this point.

RUSSELL'S CASE, KING'S BENCH, 1483. (Y. B. 22 E. IV, 37).

In the King's Bench one Thomas Russell and Alice his wife brought a writ of trespass of the goods of the said Alice carried off *dum sola fuit:* and the defendant comes and pleads not guilty: and was found guilty with damages £20 by inquest at Nisi Prius: and before the day in banc an injunction was issued out of the Chancery against the plaintiffs, that they should not proceed to judgment under pain of £100: wherefore the judgment was stayed for a long time. And then Hussey, the Chief Justice asked of Spilman and Fincheden, who were with the plaintiffs, if they wished to pray judgment according to the verdict. Fincheden: Yes, unless for doubt of the penalty involved in the injunction or for doubt of imprisonment of our client for non-obedience to the Chancellor; otherwise we wish to pray judgment. Fairfax (J.): Notwithstanding the injunction he may pray judgment: for if the injunction was against the plaintiff himself, then his attorney may pray judgment, or *è contra.* Hussey (J.): We have communed of this matter among ourselves, and see not any harm which can come to the party, if he prayed judgment against him, for that he should have the sum contained in the injunction. The law would not wish to deny him this. I well know then there is nothing else except imprisonment in the Fleet. And as to that, if the Chancellor commits a man to the Fleet, as long as you are there if you will give us cognizance we will issue a *habeas corpus* returnable before us, and when he comes before us we will dismiss him: and so he shall not be put to great mischief; and all that we can do for him, we will do. But notwithstanding this, Fairfax said he would go to the Chancellor and ask of him if he would dismiss the injunction: and they demanded judgment: and they had [judgment] that they should recover their damages taxed by the inquest: but they would not give judgment to have damages for the vexation in the Chancery by injunction: and they said, that if the Chancellor would not dismiss him from the injunction, that, notwithstanding that, they would have given judgment, if the party wished to pray for it: *quod nota,* etc.

Extracts from A REPLICATION OF A SERJAUNTE AT THE LAWES OF ENGLAND TO CERTAINE POINTES ALLEAGED BY A STUDENT OF THE SAID LAWES OF ENGLAND. Written temp. Henry VIII. in answer to certain points in the contemporary treatise called Doctor and Student. (Hargrave's Law Tracts, 323.)

[In *Doctor and Student* the student had explained that where a bond had been given and paid, but no release had been taken, though the bond was enforceable at law, the obligor might prevent suit upon it and obtain cancellation by a subpœna in chancery. To this the serjeant takes exception.]

I mervaile moche what authorite the chancellor hath to make such a writ in the Kinge's name, and howe he dare presume to make soche a writ to let the Kinge's subjects to sue his lawes, the which the kinge himselfe cannot do rightewiselye; for he is sworne the contrarie, and it is saide *hoc possumus quod de jure possumus.* Also the king's judges of this realme, that bee appointed to minyster his lawes of his realme be sworne to minister his lawes of the realme indifferentlye to the kinge's subjects; and so is not the chancellor. Also the serjaunts at the lawe be sworne to see the king's subjects to be justifyed by the lawes of this realme determinable by the king's judges and not by my lord chancellor. Yet this notwithstandinge, if the kinge's subjects, upon a surmised bill put into the chauncerie, shal be prohibited by a subpœna to sue accordinge to the lawes of the realme, and be compelled to make aunsweare before my lord chauncellor, than shall the lawe of the realme be set as voyde and taken as a thing of none effecte, and the king's subjects shall be ordered by the discretion of the chauncellor and by no lawe, contrarie to all good reason and all good policy. And so me seemeth, that such a sute by a subpœna is not onlye against the law of the realme, but also against the lawe of reason. Also me seemeth, that it is not confoarmable to the lawe of God. For the lawe of God is not contrary in itself, that is to say, one in one place, and contrary in another place, if it be well perceyved and understood, as ye can tell, Mr. Doctour; but this lawe is one in one courte contrarie in another court. And so me seemeth, that it is not onlie againste the lawe of reason, but also against the lawe of God. Also me seemeth, that this suite by a subpœna is againste the common well of the realme. For the common well of everie realme is to have a good lawe, so that the subjects of the realme maie be justified by the same, and the more plaine and open that the lawe is,

and the more knowledge and understanding that the subject hath of the lawe, the better it is for the common well of the realme; and the more uncertaine that the lawe is in any realme, the lesse and the worse it is for the common well of the realme. But if the subjects of any realme shall be compelled to leave the lawe of the realme, and to be ordered by the discretion of one man, what thinge may be more unknowen or more uncertaine? But if this manner of suite by a subpœna be maintayned, as you, Mr. Student, wold have it, in what uncertaintie shall the king's subjects stande, whan they shall be put from the lawe of the realme, and be compelled to be ordered by the discretion and conscience of one man! And namelie for as moch as conscience is a thinge of great uncertaintie; for some men thinke that if they treade upon two strawes that lye acrosse, that they ofende in conscience, and some man thinketh that if he lake money, and another hath too moche, that he may take part of his with conscience; and so divers men divers conscience; for everie man knoweth not what conscience is so well as you, Mr. Doctour.

Student. Howe is it than, that the chancellours of England have used this?

Serjaunte. Verelie I thincke for lacke of knowledge of the goodness of the lawes of the realme; for moste commonly the chancelours of England have been spiritual men, that have had but superficial knowledge in the lawes of the realme; and whan soch a byll hath been made unto them, that soche a man should have greate wronge to be compelled to paie two times for one thinge, the chancellour, not knowinge the goodness of the common lawe, neyther the inconvenience that mighte ensue by the saide writ of subpœna, hath temerouslye directed a subpœna to the plaintiff in the kinge's name, commandinge him to cease his suite that he hath before the king's justices, and to make aunsweare before him in the chauncerie; and he regardinge no lawe, but trustinge to his owne wit and wisdom, giveth judgment as it pleaseth himselfe, and thinketh, that his judgment being in soche authoritie is farre better and more reasonable than judgments that be given by the king's justices according to the common lawe of the realme. In my conceite in this case I may liken my lord chaunceler, which is not learned in the lawes of the realme, to him, that stands in the Vale of White-horse farre from the horse and holdeth the horse; and the horse seemeth and appeereth to him a goodly horse and well proportioned in every poinct, and that if he come neere to the place wher the horse is he can perceave

no horse nor proportion of any horse. Even so it fareth by my lord chauncelor that is not learned in the lawes of the realme; for whan such a bill is put unto him, it appeereth to him to be a matter of great conscience and requireth reformation; and the matter in the bill appeereth so to him, because he is farre from the understandinge and the knowledge of the lawe of the realme and the goodness thereof; but if he draw neere to the knowledge and understandinge of the common law of the realme, so that he maie come to the perfecte knowledge and goodnes of it, he shall well perceive that the matter contayned in the bill put to him in the chauncerie is no matter to be refourmed there, and namelie in soche wise as is used. Moreover, Mr. Student, I marvaile moche, that ye say that men that have wronge maye be holpen in many cases by a subpœna, in so moche as you have in your *Natura Brevium* sevrall writts and divers natures for the reformation of everie wronge that is donne and committed contrarye to the lawes of the realme; and amonge all your writs that you have in your *Natura Brevium*, ye have none there called subpœna, neyther yet the nature of him declared there, as ye have of all the writs specified in the saide booke. Wherefore me seemeth it standeth not with your studie, neither yet with your learninge of the lawes of the realme, that any man that is wronged should have his remedie by a subpœna. If a subpœna had been a writ ordained by the lawe of the realme to reforme a wronge, as other writs in the saide book be, he shold have bin set in the booke of *Natura Brevium*, and the nature of him declared there, and for the reformation of what wronge it layeth, as it is in the writs contayned in the saide booke; and for as moche as it is not so, it is a writ abused in my mynde contrarie to the common lawe of the realme, and contrary to reason, and all good conscience, and yet is coloured by the pretence of conscience.

Extracts from COKE'S FOURTH INSTITUTE.

In the parliament holden 13 R. 2 (1390) the commons petitioned to the king that neither the chancellor nor other counsellor doe make any order against the common law, nor that any judgment be given without due processe of law. Whereunto the king's answer was: The usages heretofore shall stand, so as the king's royalty be saved. . . .

In the parliament holden in 17 R. 2 (1394), it is enacted at petition of the commons, that forasmuch as people were compelled to come before the king's council, or in chancery, by writs grounded

upon untrue suggestions, that the chancelor for the time being presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages according to his discretion to him who is so travelled unduly as is aforesaid.

[Lord Coke now quotes or cites three similar petitions of the commons in the reigns of Henry IV. and Henry V., and proceeds:]

The commons petitioned that no writs or privy seals be sued out of the chancery, exchequer, or other places to any man to appear at a day upon a pain, either before the king and his councell, or in any other place, contrary to the ordinary course of the common law; whereunto the king answered that such writs should not be granted without necessity.

Amongst the petitions of the commons you shall find this, That all writs of subpœna and *certis de causis*, going out of the chancery and the exchequer may be enrolled, and not granted of matters determinable at the common law, on pain the plaintiff doe pay by way of debt to the defendant forty pound; whereunto is answered the king will be advised.[1]

It is enacted to endure untill the next parliament, that the exception (how that the party hath sufficient remedy at the common law) shall discharge any matter in chancery. At the next parliament you shall find a petition in these words: No man to be called by privy seal or subpœna to answer any matters but such as have no remedy by the common law, and that to appear so by the testimony of two justices of either bench, and by indenture between them and the plaintiff. . . .

In anno 31 H. 6, cap. 2 (1453) there is a proviso in these words: Provided that no matter determinable by the law of this realm shall be by the said act determined in other form than after the course of the same law in the king's courts having jurisdiction of the same law.

HEATH v. RYDLEY, KING'S BENCH, 1613. (Croke's James 335.)

In an action of debt at the common law, judgment being against the defendant, and day given to move in arrest thereof, he in the interim preferred his bill in chancery, and obtained an injunction to stay judgment and execution: but, notwithstanding, the Court granted both; for by the statutes of 27 Edw. 3 c. 1 and 4 Hen. 4

[1] The formula when the king vetoes a bill.

c. 23 after judgment given (be it in plea real or personal), the party ought to be quiet, and to submit thereto; for a judgment being once given *in curia domini regis*, ought not to be reversed nor avoided but by error or attaint. And in the same Term, upon a prohibition to stay proceedings in the court of requests, it was delivered for a general maxim in law, That if any court of equity should intermeddle with any matters properly triable at the common law, or which concern freehold, they are to be prohibited; for neither *writ of error* nor *attaint* can be brought to reverse the decrees made in those courts: otherwise it is upon trials at the common law; for all matters are there decided either by a jury of twelve men, against whom (if they err in their verdict) an attaint lieth; or by the Judges, where if they err in their judgment, the party grieved may bring his writ of error.

WILSON, LIFE OF JAMES I., 94–95.

A little before this time there was a breach between the Lord Chief Justice Cook and the Lord Chancellor Ellesmer, which made a passage to both their declines. Sir Edward Cook had heard and determined a Cause at the Common Law, and some report there was jugling in the business. The witness that knew, and should have related the Truth, was wrought upon to be absent, if any man would undertake to excuse his non-appearance. A pragmatical fellow of the party undertook it, went with the witness to a Tavern, called for a Gallon pot full of Sack, bid him drink, and so leaving him went into the Court. This witness is called for as the prop of the Cause, the Undertaker answers upon Oath, He left him in such a condition, that if he continues in it but a quarter of an hour, he is a dead man. This evidencing the mans incapability to come, deaded the matter so, that it lost the Cause. The Plaintiffs that had the Injury bring the business about in Chancery; the Defendants (having had Judgment at Common Law) refuse to obey the Orders of that Court, whereupon the Lord Chancellor for contempt of the Court commits them to prison. They petition against him in the Star Chamber, the Lord Chief Justice joyns with them, foments the difference, threatning the Lord Chancellor with a Premunire. The Chancellor makes the King acquainted with the business, who sent to Sir Francis Bacon his Attorney General, Sir Henry Montague, and Sir Randolph Crew his Serjeants at Law, and Sir Henry Yelverton his Sollicitor, commanding them to search what Presidents there have been of

late years, wherein such as complained in Chancery were relieved according to Equity and Conscience, after judgment at Common Law. These being men well versed in their Profession (after canvassing the matter thoroughly) returned answer to the King, That there hath been a strong current of Practice and proceeding in Chancery, after Judgment at Common Law, and many times after Execution, continued since Henry the sevenths time, to the Lord Chancellor that now is, both in the Reigns (seriatim) of the several Kings, and the times of the several Chancellors, whereof divers were great learned men in the Law; it being in Cases where there is no Remedy for the Subject by the strict course of the Common Law unto which the Judges are sworn. This satisfied the King, justified the Lord Chancellor, and the Chief Justice received the foil; which was a bitter potion to his spirit, but not strong enough to work on him as his Enemies wished.

HAYNES, OUTLINES OF EQUITY, 14.

The history of the growth and development of equity jurisdiction is, indeed, by no means, as not unfrequently supposed, that of a gradual, slow encroachment. On the contrary, turning to the earliest records, we see at first the chancellors trying apparently to redress every grievance of whatever nature, which would otherwise be remediless; while the labors of the more recent judges consisted, not merely in developing heads of equity already founded, but in pruning the luxuriance of the earlier jurisdiction.

In illustration of this position, let me turn to the book which I now take up, and which contains the most authentic information we possess respecting the early proceedings in chancery. It is the first volume, "Calendars in Chancery of Queen Elizabeth," printed by order of the record commissioners. Prefixed to the calendars is contained a selection of bills and petitions of dates anterior to Queen Elizabeth's reign, accompanied, in the later instances, by the answers, replications, and depositions of the witnesses. The general character of these early proceedings is in the preface to the publication thus described: "Most of the ancient petitions appear to have been presented in consequence of assaults and trespasses and a variety of outrages which were cognizable at common law, but for which the party complaining was unable to obtain redress, in consequence of the maintenance and protection afforded to his adversary by some powerful baron, or by the sheriff, or by some officer of the county in which they occurred." I need hardly

observe to the youngest beginner amongst you, that any such cause for coming into equity has long since ceased to exist; and even if any such in fact existed, it would clearly at the present day constitute no ground for equitable interposition. . . .

But in truth, we find considerable inaccuracy of opinion respecting the true function of equity prevailing at a much later date than that of these precedents. Thus, the celebrated confidential adviser of Henry the Seventh, Archbishop Morton, appears, according to a report in the Year Books, to have denied even the distinction between "technical equity" and "equity in the sense of natural justice." The report of the case which is noticed by both Mr. Spence and Lord Campbell is rather curious.

It appears that one of two executors, colluding with a debtor to the testator's estate, had released the debtor. The coexecutor filed a bill against the executor and the debtor. The chancellor was disposed to grant relief. Fineux, counsel for the defendant, observes "that there is the law of the land for many things — and that many things are tried in Chancery which are not remediable at common law; and some are merely matter of conscience, between a man and his confessor," thus pointing out accurately the distinctions between law, equity, and religion. But the chancellor retorts: "Sir, I know that every law is, or ought to be, according to the law of God," (ignoring thus altogether any distinction between law and religion); and then, merging completely the chancellor in the archbishop, he continues: "and the law of God is, that an executor, who is evilly disposed, shall not waste all the goods, etc. And I know well that if he do so, and do not make amends, if he have the power, *il sera damné* in hell." And then the chancellor proceeds to lay down some rather unsound law.

EARL OF OXFORD'S CASE, IN CHANCERY, 1616. (1 Rep. in Chan., 1, 4-11.)

Lord Chancellor Ellesmere: 1. The law of God speaks for the plaintiff. Deut. xxviii.

2. And equity and good conscience speak wholly for him.

3. Nor does the law of the land speak against him. But that and equity ought to join hand in hand in moderating and restraining all extremities and hardships.

By the law of God, he that builds a house ought to dwell in it; and he that plants a vineyard ought to gather the grapes thereof. Deut. xxviii, 30.

And yet here in this case, such is the conscience of the doctor, the defendant, that he would have the houses, gardens, and orchards, which he neither built nor planted; but the chancellors have always corrected such corrupt consciences, and caused them to render *quid pro quo:* for the common law itself will admit no contract to be good without *quid pro quo*, or land to pass without a valuable consideration; and therefore equity must see that a proportionable satisfaction be made in this case.

[The Chancellor then cites and discusses a precedent, and proceeds:]

And his Lordship, the plaintiff in this case, only desires to be satisfied of the true value of the new building and planting since the conveyance, and convenient allowance for the purchase.

And equity speaks as the law of God speaks, but you would silence equity.

First. Because you have a judgment at law.

Secondly. Because that judgment is upon a statute law.

To which I answer, —

First. As a right of law can not die, no more can equity in chancery die; and, therefore, *nullus recedat a Cancellaria sine remedio*, 4 E. 4, 11, a. Therefore the Chancery is always open; and although the term be adjourned, the Chancery is not; for conscience and equity are always ready to render to everyone their due, 9 E. 4, 11, a. The Chancery is only removable at the will of the King and Chancellor; and by 27 E. 3, 15, the Chancellor must give account to none, but only to the King and Parliament.

The cause why there is a Chancery is, for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances.

The office of the Chancellor is to correct men's consciences for frauds, breaches of trusts, wrongs, and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law, which is called *summum jus*. . . .

But, secondly, it is objected that this is a judgment upon a statute law.

To which I answer, it hath ever been the endeavor of all parliaments to meet with the corrupt consciences of men as much as might be, and to supply the defects of the law therein; and if this cause were exhibited to the Parliament, it would soon be ordered and determined by equity; and the Lord Chancellor is, by his place,

under his majesty, to supply that power until it may be had, in all matters of meum and tuum, between party and party; and the Lord Chancellor doth not except to the statute or the law (judgment) upon the statute, but taketh himself bound to obey that statute, according to 8 Ed. 4; and the judgment thereupon may be just; and the college, in this case, may have a good title in law, and the judgment yet standeth in force. . . .

SELDEN, TABLE TALK, tit. Equity. [Selden died 1654. His *Table Talk* was published by his amanuensis after his death.]

Equity in law is the same that the spirit is in religion, what everyone pleases to make it. Sometimes they go according to conscience, sometimes according to law, sometimes according to the will of the court. Equity is a roguish thing; for the law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make his foot the standard. For if the measure we call a chancellor's foot, what an uncertain measure this would be. One chancellor has a long foot, another a short foot, another an indifferent foot; 'tis the same thing in the chancellor's conscience.

SPENCE, EQUITABLE JURISDICTION OF THE COURT OF CHANCERY, I, 413.

Some extravagances which originated perhaps in too high an estimate on the part of the Chancellors of Henry VIII and Elizabeth, of their individual endowments, and erroneous views as to the nature of their office, occasioned in part by the language of flattery, gave occasion to the great Selden to remark, more perhaps in jest than in earnest, that equity was a roguish thing; it was according to the conscience of him that was Chancellor, and as that was larger or narrower, so was equity. This might indeed have been a true picture of the court on its original foundation, had not the equitable doctrines and provisions of the Roman Law been taken as the principles on which its decisions were to be founded; but it is plain that the jurisdiction never could have been established if the conscience of the judge had been his only guide. It may be remarked, however, that too much consideration was sometimes given to the Conscience of the Queen. It is "the holy conscience of the Queen, for matter of equity," said Sir C. Hatton [temp. Elizabeth], "that is in some sort committed to the Chancellor."

But generally during this reign, as well as before, equity and conscience as rules of decision were deferred to principles deduced from the Roman jurisprudence, the sanction of which was occasionally directly adverted to, independently of the private conscience of the judge. Nothing is recorded as having been delivered judicially from the bench which can warrant the supposition that the private opinion or conscience of the judge, or what is perhaps equivalent, his whim or caprice, independent of principle and precedent, was a legitimate ground of decision.

No doubt precedents had to be made when cases of extremity, to use the language of the times, arose, calling for the interference of the court to correct the rigor of the law or to supply its defects.

These precedents, though not of binding authority like judgments at law, for if they had been, at that time, a Court of Equity must afterwards have been erected to correct the Court of Chancery; nor entered of record as judgments at law, were frequently, from Henry VI downwards, reported in the Year Books, — to be referred to, no doubt, as future guides. These, together with other cases, were collected and published in the reigns of Elizabeth, James and Charles.

The Chancellors in many cases expressly referred to precedent as the ground of their decisions.

We find the Chancellor in the time of Car. I, where the case exhibited no novelty in its circumstances so as to call for a precedent to be made, refusing to interfere because there was no precedent; and there are instances of references to the chief justices and other judges to see whether the Lord Chancellor had jurisdiction in the cause. Lord Ellesmere, (temp. James I) fully recognizing the force of precedent, endeavored to provide against the irregularities, to which he occasionally gave way, being converted into precedents. I may add that the precedents collected by Tothill and Sir George Cary, have been cited by subsequent judges, amongst others by the great Lord Hardwicke [Chancellor, 1737–1756], so that there is an uninterrupted chain in the influence of precedent from the earliest times, in the application of the principles of equity and conscience, positively, that is where they ought to be applied, and negatively, that is, where the law ought to be left to its own operation.

When, therefore, Lord Nottingham declared (1676), that with such a Conscience as is only *naturalis et interna* this court has nothing to do, the Conscience by which he was to proceed was

merely *civilis* and *politica;* he was not making a rule, but declaring what had become of the established doctrine of the Court.

MAITLAND, EQUITY, 6–11.

I do not think that in the fourteenth century the Chancellors considered that they had to administer any body of substantive rules that differed from the ordinary law of the land. They were administering the law, but they were administering it in cases which escaped the meshes of the ordinary courts. The complaints that come before them are in general complaints of indubitable legal wrongs, assaults, batteries, imprisonments, disseisins, and so forth — wrongs of which the ordinary courts take cognizance, wrongs which they ought to redress. But then owing to one thing and another such wrongs are not always redressed by courts of law. In this period one of the commonest of all the reasons that complainants will give for coming to the Chancery is that they are poor while their adversaries are rich and influential — too rich, too influential to be left to the clumsy processes of the old courts and the verdicts of juries. However, this sort of thing can not well be permitted. The law courts will not have it and parliament will not have it. Complaints against this extraordinary justice grow loud in the fourteenth century. In history and in principle it is closely connected with another kind of extraordinary justice which is yet more objectionable, the extraordinary justice that is done in criminal cases by the King's Council. Parliament at one time would gladly be rid of both — of both the Council's interference in criminal matters, and the Chancellor's interference with civil matters. And so the Chancellor is warned off the field of common law — he is not to hear cases which might go to the ordinary courts, he is not to make himself a judge of torts and contracts, of property in lands and goods.

But, then, just at this time it is becoming plain that the Chancellor is doing some convenient and useful works that could not be done, or could not easily be done by the courts of common law. He has taken to enforcing uses or trusts. Of the origin of uses or trusts you will have read and I shall have something to say about it on another occasion. I don't myself believe that the use came to us as a foreign thing. I don't believe that there is anything Roman about it. I believe that it was a natural outcome of ancient English elements. But at any rate I must ask you not to believe that either the mass of the nation or the common lawyers of the

fourteenth and fifteenth centuries looked with disfavour upon uses. No doubt they were troublesome things, things that might be used for fraudulent purposes, and statutes were passed against those who employed them for the purpose of cheating their creditors or evading the law of mortmain. But I have not a doubt that they were very popular, and I think we may say that had there been no Chancery, the old courts would have discovered some method of enforcing these fiduciary obligations. That method, however, must have been a clumsy one. A system of law which will never compel, which will never even allow, the defendant to give evidence, a system which sends every question of fact to a jury, is not competent to deal adequately with fiduciary relationships. On the other hand, the Chancellor had a procedure which was very well adapted to this end. To this we may add that very possibly the ecclesiastical courts (and the Chancellor, you will remember, was almost always an ecclesiastic) had for a long time past been punishing breaches of trust by spiritual censures, by penance and excommunication. And so by general consent, we may say, the Chancellor was allowed to enforce uses, trusts or confidences.

Thus one great field of substantive law fell into his hand — a fruitful field, for in the course of the fifteenth century uses became extremely popular. Then, as we all know, Henry VIII — for it was rather the king than his subservient parliament — struck a heavy blow at uses. The king was the one man in the kingdom who had everything to gain and nothing to lose by abolishing uses, and as we all know he merely succeeded in complicating the law, for under the name of "trusts" the Chancellors still reigned over their old province. And then there were some other matters that were considered to be fairly within his jurisdiction. An old rhyme allows him "fraud, accident, and breach of confidence" — there were many frauds which the stiff old procedure of the courts of law could not adequately meet, and "accident," in particular the accidental loss of a document, was a proper occasion for the Chancellor's interference. No one could set any very strict limits to his power, but the best hint as to its extent that could be given in the sixteenth century was given by the words "fraud, accident and breach of confidence." On the other hand, he was not to interfere where a court of common law offered an adequate remedy. A bill was "demurrable for want of equity" on that ground.

In the course of the sixteenth century we begin to learn a little about the rules that the Chancellors are administering in the field

that is thus assigned to them. They are known as "the rules of equity and good conscience." As to what they have done in remoter times we have to draw inferences from very sparse evidence. One thing seems pretty plain. They had not considered themselves strictly bound by precedent. Remember this, our reports of cases in courts of law go back to Edward I's day — the middle ages are represented to us by the long series of Year Books. On the other hand, our reports of cases in the Court of Chancery go back no further than 1557; and the mass of reports which come to us from between that date and the Restoration in 1660 is a light matter. This by itself is enough to show us that the Chancellors have not held themselves very strictly bound by case law, for men have not cared to collect cases. Nor do I believe that to any very large extent the Chancellors had borrowed from the Roman Law — this is a disputed matter; Mr. Spence has argued for their Romanism, Mr. Justice Holmes against it. No doubt through the medium of the canon law these great ecclesiastics were familiar with some of the great maxims which occur in the *Institutes* or the *Digest*. One of the parts of the *Corpus Juris Canonici*, the Liber Sextus, ends with a bouquet of these high-sounding maxims — *Qui prior est tempore potior est jure*, and so forth, maxims familiar to all readers of equity reports. No doubt the early Chancellors knew these and valued them — but I do not believe that we ought to attribute to them much knowledge of Roman law or any intention to Romanise the law of England. For example, to my mind the comparison sometimes drawn between the so-called double ownership of England, and the so-called double ownership of Roman law cannot be carried below the surface. In their treatment of uses or trusts the Chancellors stick close, marvellously close, to the rules of the common law — they often consulted the judges, and the lawyers who pleaded before them were common lawyers, for there was as yet no "Chancery Bar." On the whole, my notion is that with the idea of a law of nature in their minds they decided cases without much reference to any written authority, now making use of some analogy drawn from the common law, and now of some great maxim of jurisprudence which they have borrowed from the canonists or the civilians.

In the second half of the sixteenth century the jurisprudence of the court is becoming settled. The day for ecclesiastical Chancellors is passing away. Wolsey is the last of the great ecclesiastical Chancellors, though in Charles I's day we have one more divine in

the person of Dr. Williams. Ellesmere, Bacon, Coventry, begin to administer an established set of rules which is becoming known to the public in the shape of reports and they begin to publish rules of procedure. In James I's day occured the great quarrel between Lord Chancellor Ellesmere and Chief Justice Coke which finally decided that the Court of Chancery was to have the upper hand over the courts of law. If the Chancery was to carry out its maxims about trust and fraud it was essential that it should have a power to prevent men from going into the courts of law and to prevent men from putting in execution the judgments that they had obtained in courts of law. In fraud or in breach of trust you obtain a judgment against me in a court of law; I complain to the Chancellor, and he, after hearing what you have to say, enjoins you not to put in force your judgment, says in effect that if you do put your judgment in force you will be sent to prison. Understand well that the Court of Chancery never asserted that it was superior to the courts of law; it never presumed to send to them such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must not do that or quashing their proceedings — the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judges, but to the party. You in breach of trust have obtained a judgment — the Chancellor does not say that this judgment was wrongly granted, he does not annul it, he tells you that for reasons personal to yourself it will be inequitable for you to enforce that judgment, and that you are not to enforce it. For all this, however, it was natural that the judges should take umbrage at this treatment of their judgments. Coke declared that the man who obtained such an injunction was guilty of the offence denounced by the Statutes of Praemunire, that of calling in question the judgments of the king's courts in other courts (these statutes had been aimed at the Papal *curia*). King James had now a wished-for opportunity of appearing as supreme over all his judges, and all his courts, and, acting on the advice of Bacon and other great lawyers, he issued a decree in favour of the Chancery. From this time forward the Chancery had the upper hand. It did not claim to be superior to the courts of law, but it could prevent men from going to those courts, whereas those courts could not prevent men from going to it.

Its independence being thus secured, the court became an extremely busy court. Bacon said that he had made 2000 orders

in a year, and we are told that as many as 16,000 causes were pending before it at one time: indeed it was hopelessly in arrear of its work. Under the Commonwealth some vigorous attempts were made to reform its procedure. Some were for abolishing it altogether. It was not easily forgotten that the Court of Chancery was the twin sister of the Court of Star Chamber. The projects for reform came to an end with the Restoration. Still it is from the Restoration or thereabouts — of course a precise date can not be fixed — that we may regard the equity administered in the Chancery as a recognised part of the law of the land. Usually, though not always, the great seal is in the keeping of a great lawyer — in 1667 Sir Orlando Bridgman, the great conveyancer, has it; in 1673 Sir Heneage Finch, afterwards Lord Nottingham, who has been called the father of equity; in 1682 Sir Francis North, afterwards Lord Guilford; in 1693 Sir John Somers, afterwards Lord Somers, a great common lawyer. I think that Anthony Ashley, Earl of Shaftesbury, the famous Ashley of the Cabal, was the last non-lawyer who held it, and he held it for but one year, from 1672 to 1673. Then during the eighteenth century there comes a series of great Chancellors. In 1705 Cowper, in 1713 Harcourt, in 1725 King, in 1733 Talbot, in 1737 Hardwicke, in 1757 Northington, in 1766 Camden, in 1778 Thurlow, in 1793 Loughborough, in 1801 Eldon. In the course of the century the Chancery reports improve; the same care is spent upon reporting the decrees of the Chancellors that has long been spent on reporting the judgments of the judges in the courts of common law. Gradually, too, a Chancery bar forms itself, that is to say, some barristers begin to devote themselves altogether to practising before the Chancellor, and do not seek for work elsewhere. Lastly, equity makes its way into the text-books as a part, and an important part, of the law of the land.

GEE v. PRITCHARD, IN CHANCERY, 1818. (2 Swanst. 402.)

Lord Eldon, Chancellor, said: It is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley. The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I can not agree that the doctrines of this court are to be changed

with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.

BLACKSTONE, COMMENTARIES, III, 434, 436.

But the systems of jurisprudence in our courts, both of law and equity, are now equally artificial systems, founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings; the one being originally derived (though much reformed and improved) from the feodal customs as they prevailed in different ages in the Saxon and Norman judicatures; the other (but with equal improvements) from the imperial and pontifical formularies introduced by their clerical chancellors.

Such, then, being the parity of law and reason which governs both species of courts, wherein (it may be asked) does their essential difference consist? It principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief. Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz., the true construction of securities for money lent, and the form and effect of a trust or second use; upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity, and is inwardly bottomed upon the same substantial foundations as the legal system which hath hitherto been delineated in these commentaries; however different they may appear in their outward form, from the different taste of their architects.

1. And, first, as to the mode of proof. When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction, and, that being once discovered, the judgment is the same in equity as it would have been at law. But, for want of this discovery at law, the courts of equity have acquired a concurrent jurisdiction with every court in all matters of account. As incident to accounts, they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts,

they also take the concurrent jurisdiction of tithes, and all questions relating thereto; of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. It would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud; all matters in the private knowledge of the party, which, though concealed, are binding in conscience; and all judgments at law, obtained through such fraud or concealment. And this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth; and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all.

2. As to the mode of trial. This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, wherever they happen to reside. If, therefore, the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them, and (in consequence) to exercise the same jurisdiction, which might have been exercised at law, if the witnesses could probably attend.

3. With respect to the mode of relief. The want of a more specific remedy, than can be obtained in the courts of law, gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible: instead of giving damages for their nonperformance. And hence a fiction is established, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally: and this fiction is so closely pursued through all its consequences, that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste, and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law, in a great multiplicity of actions, a court of equity assumes a

jurisdiction, to prevent the expense and vexation of endless litigations and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief: as by setting aside fraudulent deeds, decreeing reconveyances, or directing an absolute conveyance merely to stand as a security. And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a court of equity holds plea of all debts, encumbrances, and charges that may affect it or issue thereout.

4. The true construction of securities for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it; but this ownership is mutually transferred, and the mortgagor is barred from redemption if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may, when out of possession, be barred by length of time, by analogy to the statute of limitations.

5. The form of a trust, or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction: but the trust is governed by very nearly the same rules as would govern the estate in a court of law, if no trustee was interposed: and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law.

These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity; which differ, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived to maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page; and which have been implicitly received and handed down by subsequent compilers, without attending to

those gradual accessions and derelictions, by which in the course of a century this mighty river hath imperceptibly shifted its channel. Lambard in particular, in the reign of Queen Elizabeth, lays it down, that "equity should not be appealed unto, but only in rare and extraordinary matters: and that a good chancellor will not arrogate authority in every complaint that shall be brought before him upon whatsoever suggestion: and thereby both overthrow the authority of the courts of common law, and bring upon men such a confusion and uncertainty, as hardly any man should know how or how long to hold his own assured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers, who have successively held the great seal, have by degrees erected the system of relief administered by a court of equity into a regular science, which cannot be attained without study and experience, any more than the science of law; but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what mode of suit, as readily and with as much precision in a court of equity as in a court of law.

IN RE HALLETT'S ESTATE, COURT OF APPEAL, 1879 (13 Ch. D. 696, 710).

Jessel, M. R., said: The moment you establish the fiduciary relation, the modern rules of Equity, as regards following trust money, apply. I intentionally say modern rules, because it must not be forgotten that the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time — altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented. Take such things as these: the separate use of a married woman, the restraint on alienation, the

modern rule against perpetuities, and the rules of equitable waste. We can name the Chancellors who first invented them, and state the date when they were first introduced into Equity jurisprudence; and, therefore, in cases of this kind, the older precedents in Equity are of very little value. The doctrines are progressive, refined, and improved; and if we want to know what the rules of Equity are, we must look, of course, rather to the more modern than the more ancient cases.

4. THE LAW MERCHANT

CARTER, EARLY HISTORY OF THE LAW MERCHANT IN ENGLAND, 17 Law Quar. Rev. 232.

Although the custom of the King's Court became the common law of the land, there were three classes of persons who were in a varying degree exempt from it, the priest, the Jew, and the merchant. The relation of the priest to the Canon law of the Church has been treated of authoritatively by Professor Maitland; the place taken by the Jew will be further elucidated, we hope, by the promised volume of the Selden Society on the Jewish Plea Rolls; the position of the merchant is still in need of authentic treatment. We know, however, that side by side with the custom of the King's Court existed the "custom of merchants," whatever that was. The reasons for this obscurity are twofold; few merchant cases came up for decision in the King's Courts, and the local records such as those of the Piepoudre Court of Bristol, the great western port of the kingdom, have most unfortunately been lost or destroyed.

And yet by piecing together fragments of evidence collected here and there, we can arrive at an opinion to the effect that there was a definite body of mercantile law, slightly affected perhaps by local variations, which was recognized in this country and in the ports of Europe, and that it was administered there and here in Courts of similar character supported by the royal authority. It was really Law, and it was really International. The history of the law merchant in this country can shortly be stated. It was from the first administered in local and popular Courts of *mercatores et marinarii*, and was intimately connected with the King in Council. There is statutory recognition of this connection in the Statute of the Staple. The Court of Admiralty after a struggle usurped the jurisdiction, the common law Courts in turn destroyed the Admiralty jurisdiction by repeated prohibitions, while the merchants, dissatisfied with the illiberal policy of the common lawyers, might have

resorted to the Courts of Chancery whose doctrines and practice were very similar to their own, had not Lord Mansfield appeared to create the mercantile law of this country.

BULLER v. CRIPS, QUEEN'S BENCH, 1704. (6 Mod. 29.)

A note was in this form: "I promise to pay John Smith, or order, the sum of one hundred pounds, on account of wine had from him." John Smith endorses this note to another; the indorsee brings an action against him that drew this note, and declares upon the custom of merchants as upon a bill of exchange.

A motion was made in arrest of judgment upon the authority of the case of *Martin* v. *Clarke.*

But *Brotherick* would distinguish this case from that: for there the party to whom the note was originally made brought the action, but here it is by the indorsee; and he that gave this note did, by the tenor thereof, make it assignable or negotiable by the words "or order," which amount to a promise or undertaking to pay it to any whom he should appoint, and the indorsement is an appointment to the plaintiff.

Holt, C. J.: I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom; at which Hale, C. J., who tried it, laughed, and said they had a hopeful case of it. And in my Lord North's time it was said that the custom in that case was part of the common law of England; and these actions since became frequent, as the trade of the nation did increase; and all the difference between foreign bills and inland bills is, that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest, and the notes in question are only an invention of the goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them; and sure to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a specialty. And, besides, it would impower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of bills of exchange; for the reason of the custom of bills of exchange is for the expedition of trade and its safety; and likewise it hinders

the exportation of money out of the realm. He said, if the indorsee had brought this action against the indorser, it might peradventure lie; for the indorsement may be said to be tantamount to the drawing of a new bill for so much as the note is for, upon the person that gave the note; or he may sue the first drawer in the name of the indorser, and convert the money, when recovered, to his own use; for the indorsement amounts at least to an agreement that the indorsee should sue for money in the name of the indorser, and receive it to his own use; and, besides, it is a good authority to the original drawer to pay the money to the indorsee.

And Powell, J., cited one case, where a plaintiff had judgment upon a declaration of this kind in the Common Pleas; and that my Lord Treby was very earnest for it, as a mighty convenience for trade; but that, when they had considered well the reasons why it was doubted here, they began to doubt, too.

The whole court seemed clear for staying judgment.

At another day, Holt, C. J., declared that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; and that they had told him it was very frequent with them to make such notes, and that they looked upon them as bills of exchange, and that they had been used for a matter of thirty years, and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange. Indeed, I agree, a bill of exchange may be made between two persons without a third; and, if there be such a necessity of dealing that way, why do not dealers use that way which is legal? and may be this; as, if A. has money to lodge in B.'s hands, and would have a negotiable note for it, it is only saying thus, "Mr. B., pay me, or order, so much money value to yourself," and signing this, and B. accepting it; or he may take the common note and say thus, "For value to yourself, pay me (or indorsee) so much," and good.

And the court at last took the vacation to consider of it.

BLACKSTONE, COMMENTARIES, I, 75 (1765).

To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria;* which, however different from the general rules of the common law, is yet ingrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial

transactions; for it is a maxim of law, that "*cuilibet in sua arte credendum est.*"

The rules relating to particular customs regard either the proof of their existence; their legality when proved; or their usual method of allowance. And first we will consider the rules of proof:

As to gavelkind, and borough-English, the law takes particular notice of them, and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases (both to show the existence of the custom, as, "that in the manor of Dale, lands shall descend only to the heirs male, and never to the heirs female;" and also to show "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court.

WOODDESSON, ELEMENTS OF JURISPRUDENCE, lxxix (1792).

But the branch of the law of nations, which there have been the most frequent occasions of regarding, especially since the great extension of commerce, and intercourse with foreign traders, is called the law of Merchants. This system of generally received law has been admitted to decide controversies touching bills of exchange, policies of insurance, and other mercantile transactions, both where the subjects of any foreign power, and (for the sake of uniformity) where natives of this realm only, have been interested in the event. Its doctrines have, of late years, been wonderfully elucidated, and reduced to rational and firm principles, in a series of litigations before a judge, long celebrated for his great talents, and extensive learning in general jurisprudence, and still more venerable for his animated love of justice. Under his able conduct and direction, very many of these causes have been tried by a jury of merchants of London; and such questions of this kind as have come before the Court of King's Bench in term time, are laid before the public by a copious and elaborate compiler.

The law of merchants, as far as it depends on custom, constitutes a part of the voluntary, not of the necessary, law of nations. It may, therefore, so far as it is merely positive, be altered by any municipal legislature, where its own subjects only are concerned.

WOODDESSON, LECTURES ON THE LAW OF ENGLAND, III, 53 (1792).

By the custom of merchants, he to whom a bill is payable, commonly called the holder, ought, within a reasonable time after his receipt of it, to present the bill to him to whom it is directed, for his acceptance, and such person ought also, within a reasonable time, to accept the bill or refuse payment of it; and reasonable notice ought to be given to drawers and indorsers of nonpayment or nonacceptance by those liable in the first instance.

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The declaration in actions on bills of exchange, after stating the particular facts, adds, "by reason whereof, and by the custom of merchants, the defendant became liable to pay, and, being so liable, undertook and faithfully promised to pay the contents of the bill."

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On the other hand, if two persons draw a bill of exchange payable "to our order," this, indeed, was thought by the court of King's Bench to render them so far partners as to that transaction (though admitted not to be so otherwise,) that an indorsement by one of them was binding and effectual: but the cause was finally determined by a special jury in London, who were decidedly of opinion, that, by the usage of merchants and bankers, the indorsement ought to have been by both the payees.

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In what cases, and how far, insurers shall be liable, is governed chiefly by the custom of merchants; and some at least of that profession are usually impanelled on the jury to try these suits.

CHRISTIAN'S NOTE TO I BL. COMM. 75 (1803).

The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parliamenti*, describes only a great division of the law of England. The laws relating to bills of exchange, insurance, and all mercantile contracts, are as much the general law of the land as the laws relating to marriage or murder. But the expression has very unfortunately led merchants to suppose that all their crude and new-fangled fashions and devices immediately become the law of the land; a notion which, perhaps, has been too much encouraged by our courts. Merchants ought to take their law from the courts, and not the courts from merchants; and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress. Merchants

ought to be considered in no higher degree than their own legislators or judges upon subjects of commerce, than farmers or sportsmen in questions upon leases or the game-laws. For the position of Lord Coke ought never to be forgotten: — "That the common law has no controller in any part of it, but the high court of parliament; and if it be not abrogated or altered by parliament, it remains still, as Littleton saith." (Co. Litt. 115). This is agreeable to the opinion of Mr. Justice Foster, who maintains that "the custom of merchants is the general law of the kingdom, and therefore ought not to be left to a jury after it has been settled by judicial determinations."

LORD CAMPBELL, LIVES OF THE CHIEF JUSTICES, 3 ed., III, 274 (Life of Lord Mansfield).

In the reign of George II., England had grown into the greatest manufacturing and commercial country in the world, while her jurisprudence had by no means been expanded or developed in the same proportion. The legislature had literally done nothing to supply the insufficiency of feudal law to regulate the concerns of a trading population; and the Common law judges had, generally speaking, been too unenlightened and too timorous to be of much service in improving our code by judicial decisions. Hence, when questions necessarily arose respecting the buying and selling of goods, — respecting the affreightment of ships, — respecting marine insurances, — and respecting bills of exchange and promissory notes, no one knew how they were to be determined. Not a treatise had been published upon any of these subjects, and no cases respecting them were found in our books of reports, — which swarmed with decisions about lords and villeins, — about marshalling the champions upon the trial of a writ of right by battle, — and about the customs of manors, whereby an unchaste widow might save the forfeiture of her dower by riding on a black ram, and in plain language confessing her offence. Lord Hardwicke had done much to improve and systematise Equity — but proceedings were still carried on in the courts of Common Law much in the same style as in the days of Sir Robert Tresilian and Sir William Gascoigne. Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves. If an action turning upon a mercantile question was brought into a court of law, the judge submitted it to the jury, who determined it according to

their own notions of what was fair, and no general rule was laid down which could afterwards be referred to for the purpose of settling similar disputes.

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He [Lord Mansfield] saw the noble field that lay before him, and he resolved to reap the rich harvest of glory which it presented to him. Instead of proceeding by legislation, and attempting to codify as the French had done very successfully in the Coustumier de Paris, and the Ordinance de la Marine, he wisely thought it more according to the genius of our institutions to introduce his improvements gradually by way of judicial decision. As respected commerce, there were no vicious rules to be overturned, — he had only to consider what was just, expedient, and sanctioned by the experience of nations farther advanced in the science of jurisprudence. His plan seems to have been to avail himself, as often as opportunity admitted, of his ample stores of knowledge, acquired from his study of the Roman civil law, and of the juridical writers produced in modern times, by France, Germany, Holland, and Italy — not only in doing justice to the parties litigating before him, but in settling with precision and upon sound principles a general rule, afterwards to be quoted and recognized as governing all similar cases. Being still in the prime of life, with a vigorous constitution, he no doubt fondly hoped that he might live to see these decisions, embracing the whole scope of commercial transactions, collected and methodized into a system which might bear his name. When he had ceased to preside in the Court of King's Bench, and had retired to enjoy the retrospect of his labours, he read the following just eulogy bestowed upon them by Mr. Justice Buller, in giving judgment in the important case of *Lickbarrow* v. *Mason*, respecting the effect of the indorsement of a bill of lading:—

"Within these thirty years the commercial law of this country has taken a very different turn from what it did before. Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period we find that, in courts of law, all the evidence in mercantile cases was thrown together; they were left generally to a jury; and they produced no general principle. From that time, we all know, the great study has been to find some certain general principle, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these

principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the understanding. And I should be very sorry to find myself under a necessity of differing from any case upon this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country."

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I naturally begin with the law of INSURANCE,— almost his own creation; and I might copy the whole of a copious treatise on the subject by Mr. Justice Park, which is composed almost entirely of his decisions and *dicta*.

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Likewise with regard to bills of exchange and promissory notes, Lord Mansfield first promulgated many rules that now appear to us to be as certain as those which guide the planets in their orbits. For example, it was till then uncertain whether the second indorsee of a bill of exchange could sue his immediate indorser without having previously demanded payment from the drawer; and it was said three Chief Justices had ruled the point one way at Nisi Prius, and as many Chief Justices had ruled it the other way.

GOODWIN v. ROBARTS, EXCHEQUER, 1875 (L. R. 10 Ex. 337, 346).

Cockburn, C. J.: Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different

departments of trade, Courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, in *Brandao* v. *Barnett*,[1] "it becomes a part of the law merchant, which Courts of justice are bound to know and recognise."

Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. Macleod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the *Lex Mercatoria*, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. 2, c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to

[1] 12 Cl. & F. at p. 805.

Mr. Chitty, the earliest case on the subject to be found in the English books is that of *Martin* v. *Boure*,[1] in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan *Pragmatica* of 1607. Savary, cited by Mons. Nouguier, in his work "*Des lettres de change*," had assigned to it a later date, namely 1620. From its obvious convenience, this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our Courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on Bills, 8th ed., p. 13.

In the meantime, promissory notes had also come into use, differing herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of *Shelden* v. *Hentley*[2] an action was brought on a note under seal by which the defendant promised to pay *to bearer* 100 *l.*, and it was objected that the note was void because not made payable to a specific person. But it was said by the Court, "*Traditio facit chartam loqui*, and by the delivery he (the maker)

[1] Cro. Jac. 6.

[2] 2 Show. 160.

expounds the person before meant; as when a merchant promises to pay to *the bearer* of the note, anyone that brings the note shall be paid." Jones, J., said that "it was the custom of merchants that made that good." In *Bromwich* v. *Lloyd* [1] the plaintiff declared upon the custom of merchants in London, on a note for money payable on demand, and recovered; and Treby, C. J., said that "bills of exchange were originally between foreigners and merchants trading with the English; afterwards, when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and, therefore, the plaintiff need not allege any custom, for now those bills were of that general use that upon an *indebitatus assumpsit* they may be given in evidence upon the trial." To which Powell, J., added, "On *indebitatus assumpsit* for money received to the use of the plaintiff the bill may be left to the jury to determine whether it was given for value received."

In *Williams* v. *Williams*,[2] where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected on error, that the note having been made in London the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the Court would take notice of it *ex officio;* and, therefore, it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person *secundum usum et consuetudinem mercatorum*, drew the bill." And the plaintiff had judgment.

Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange had received the sanction of the Courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and in a series of

[1] 2 Lutw. 1582.

[2] Carth. 269.

successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

It is obvious from the preamble of the statute, which merely recites that "*it had been held* that such notes were not within the custom of merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The Statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country, as cash, Lord Mansfield and the Court of King's Bench had no difficulty in holding, in *Miller* v. *Race*,[1] that the property in such a note passes, like that in cash, by delivery, and that a party taking it *bona fide*, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner it was held, in *Collins* v. *Martin*,[2] that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

Both these decisions of course proceeded on the ground that the property in the bank-note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made *bona fide*.

A similar question arose in *Wookey* v. *Pole*,[3] in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favor of blank or order, contained this clause, "If the blank is not filled up, the bill will be paid to bearer.'

[1] 1 Burr. 452.

[2] 1 B. & P. 648.

[3] 4 B. & Ald. 1.

Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiff's agent, had been deposited by him with the defendants, on a *bona fide* advance of money. It was held by three judges of the Queen's Bench, Bayley, J., *dissentiente*, that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. "The Courts," he says, "have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities shew, that not only money itself may pass, and the right to it may arise, by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property (*i.e.*, money), to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it."

Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the Courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer (see *Pott* v.

Clegg).[1] Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another.

Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as provided in evidence, and ratified by judicial decision in the great case of *Lickbarrow* v. *Mason*,[2] that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our Courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usage, adopted by the Courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past time? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that, substantially and in effect, it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the amount. The

[1] 16 M. & W. 321.
[2] 2 T. R. 63.

usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such.

The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security, to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. It is one which may be in a great degree prevented by prudence and care. It is one which is counterbalanced by the general convenience arising from facility of transfer, or the usage would never have become general to make scrip available to bearer, and to treat it as transferable by delivery. It is obvious that no injustice is done to one who has been fraudulently dispossessed of scrip through his own misplaced confidence, in holding that the property in it has passed to a *bona fide* holder for value, seeing that he himself must have known that it purported on the face of it to be available to bearer, and must be presumed to have been aware of the usage prevalent with respect to it in the market in which he purchased it.

Lastly, it is to be observed that the tendency of the Courts, except only in the time of Lord Holt, has been to give effect to mercantile usage in respect to securities for money, and that where legal difficulties have arisen, the legislature has been prompt to give the necessary remedy, as in the case of promissory notes and of the East India bonds.

5. THE REFORM MOVEMENT

The Reform Movement, which completed by means of legislation the modernizing of the common law, begun by the court of chancery and carried on by the law merchant, may be said roughly to cover the period from 1776 to 1876. We may begin with 1776 for two reasons: (1) Because in that year Jeremy Bentham published his first work, the *Fragment on Government;* (2) because in the same year the American Declaration of Independence set free a new group of common-law legislatures to take a hand in the renovation of our law. The period may be said

to close with the taking effect of the English Judicature Act of 1873.[1] Although legislation is still active in all common-law jurisdictions, it is no longer directed to sweeping and far-reaching changes. The tendency now is to codify and restate rather than to alter.

BLACKSTONE, COMMENTARIES, III, 267.

But this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous evils, which have their root in the frame of our constitution, and which therefore can never be cured, without hazarding everything that is dear to us. In absolute governments when new arrangement of property and a gradual change of manners have destroyed the original ideas on which the laws were devised and established, the prince by his edict may promulge a new code, more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too herculean a task to begin work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counsellors. A single legislator or an enterprising sovereign, a Solon or Lycurgus, a Justinian or a Frederick, may at any time form a concise and perhaps an uniform plan of justice: and evil betide that presumptuous subject who questions its wisdom or utility. But who, that is acquainted with the difficulty of new modeling any branch of our statute laws (though relating but to roads or to parish settlements) will conceive it ever feasible to alter any fundamental point of the common law with all its appendages and consequents and set up another rule in its stead? When, therefore, by the gradual influence of foreign trade and domestic tranquillity, the spirit of our military tenures began to decay and at length the whole structure was removed, the judges quickly perceived that the forms and delays of the old feudal actions (guarded with their several outworks of essoins, vouchers, aid prayers, and a hundred other formidable entrenchments) were ill suited to that more simple and commercial mode of property which succeeded the former and required a more speedy decision of right to facilitate exchange and alienation. Yet they wisely avoided soliciting any great legislative revolution in the old established forms which might have been productive of consequences more numerous and extensive than the most penetrating genius could foresee; but left them as they

[1] Dicey holds that a new period began in England about 1865, when collectivism came to be the leading principle in English legislation.

were to languish in obscurity and oblivion, and endeavored by a series of minute contrivances to accommodate such personal actions as were then in use, to all the most useful purposes of remedial justice: and where, through the dread of innovation, they hesitated at going so far as perhaps their good sense would have prompted them, they left an opening for the more liberal and enterprising judges who have sate in our courts of equity to shew them their error by supplying the omissions of the courts of law. And since the new expedients have been refined by the practice of more than a century, and are sufficiently known and understood, they in general answer the purpose of doing speedy and substantial justice, much better than could now be effected by any great fundamental alterations. The only difficulty that attends them arises from their fictions and circuities; but when once we have discovered the proper clew, that labyrinth is easily pervaded. Our system of remedial law resembles an old Gothic castle, erected in the days of chivalry but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless, and therefore neglected. The inferior apartments, now accomodated to daily use, are cheerful and commodious, though their approaches may be winding and difficult.

BLACKSTONE, COMMENTARIES, IV, 442.

We have seen in the course of our inquiries in this and the former volumes that the fundamental maxims and rules of the law which regard the rights of persons and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward I; and have not been much varied nor always for the better since; that our religious liberties were fully established at the Reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained till after the restoration of King Charles, nor fully and explicitly acknowledged and defined till the aera of the happy revolution. Of a constitution so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise which is justly and severely its due: — the thorough and attentive contemplation of it will furnish its best panegyric. It hath been the endeavour of these Commentaries, however the execution may have succeeded,

to examine its solid foundations, to mark out its extensive plan ; to explain the use and distribution of its parts, and from the harmonious concurrence of those parts, to demonstrate the elegant proportion of the whole.

POLLOCK, THE LAW OF ENGLAND, I–L VICTORIAE, 3 Law Quar. Rev. 643.

Blackstone caught and expressed the spirit of his time with consummate skill, but he caught it only just in time. Hardly was his ink dry when Bentham sounded a blast that rudely disturbed the supposed finality of the common law, and (what was even a greater matter) the independence of the United States, insured the free and ample development of English legal ideas in directions and for purposes as yet unknown. With the nineteenth century we are started in a wide and ever expanding field of new adventures.

The commencement of our sovereign lady's regnal year coincides approximately with the opening of a new period of development in the law of England. That period is not yet closed, but enough has been done to make it certain that for the future historian of our law, on what shore of what ocean soever he is destined to arise, Her Majesty's reign will not be less eventful or interesting than that of Edward I. or Elizabeth.

LORD BROUGHAM, SPEECHES, II, 288 (1838).

The age of law reform and the age of Jeremy Bentham are one and the same. No one before him ever seriously thought of exposing the defects in our English system of jurisprudence. He it was who first made the mighty step of trying the whole provisions of our jurisprudence by the test of expediency, fearlessly examining how far each part was connected with the rest, and with a yet more undaunted courage inquiring how far even its most consistent and symmetrical arrangements were framed according to the principles which should pervade a code of laws, their adaptation to the circumstances of society, to the wants of men, and to the promotion of human happiness.

DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND, 133–146.

My object in this lecture is, first, to sketch in the merest outline the ideas of Benthamism or individualism, in so far as when applied by practical statesmen they have affected the growth of English

law; next, to explain and describe the general acceptance of Benthamism as the dominant legislative opinion of a particular era; and, lastly, to illustrate by examples the general trend of Benthamite or individualistic legislation.

(A) *Benthamite Ideas as to the Reform of the Law.*

Bentham, considered exclusively as a reformer of the law of England, achieved two ends.

He determined, in the first place, the *principles* on which reform should be based.

He determined, in the second place, the *method*, *i. e.*, the mode of legislation, by which in England, reform should be carried out.

As to the Principles of Law Reform. — The ideas which underlie the Benthamite or individualistic scheme of reform may conveniently be summarised under three leading principles and two corollaries.

I. *Legislation is a Science.*

English law, as it existed at the end of the eighteenth century, had in truth developed almost haphazard, as the result of customs or modes of thought which had prevailed at different periods. The laws actually in existence had certainly not been enacted with a view to any one guiding principle. They had, indeed, for the most part never been "enacted" (in the strict sense of that word) at all. They were, as they still indeed to a great extent are, the result of judicial legislation built up in the course of deciding particular cases. English law had in fact grown, rather than been made, and the language used by Paley with regard to the constitution might, with the change of one word, be applied to the whole law of England.

"The [law] of England, like that of most countries in Europe, hath grown out of occasion and emergency; from the fluctuating policy of different ages; from the contentions, successes, interests, and opportunities of different orders and parties of men in the community. It resembles one of those old mansions, which, instead of being built all at once, after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art, has been altered from time to time, and has been continually receiving additions and repairs suited to the taste, fortune, or conveniency of its successive proprietors. In such a building we look in vain for the elegance and proportion,

for the just order and correspondence of parts, which we expect in a modern edifice; and which external symmetry, after all, contributes much more perhaps to the amusement of the beholder than the accommodation of the inhabitant."

But Bentham saw clearly several facts which Paley failed to recognize. The revered mansion was not only antiquated, but in many respects so unsuited to the requirements of the times, that it was to its numerous inhabitants the cause not only of discomfort but even of misery. In order to amend the fabric of the law we must, he insisted, lay down a plan grounded on fixed principles; in many instances not amendment but reconstruction was a necessity; and even gradual improvements, if they were to attain their object, must be made in accordance with fixed rules of art. Legislation, in short, he proclaimed, is a science based on the characteristics of human nature, and the art of lawmaking, if it is to be successful, must be the application of legislative principles. Of these ideas Bentham was not the discoverer but the teacher; he may be described as the prophet who forced the faith in scientific legislation upon the attention of a generation of Englishmen by whom its truth or importance was denied or forgotten.

II. *The right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness of the greatest number.*

This principle, obtained as we have seen from Priestley, is the formula with which popular memory has most closely connected the name of Bentham.

. . . . . .

III. *Every person is in the main and as a general rule the best judge of his own happiness. Hence, legislation should aim at the removal of all those restrictions on the free action of an individual which are not necessary for securing the like freedom on the part of his neighbours.*

This dogma of *laissez faire* is not, from a logical point of view, an essential article of the utilitarian creed. A benevolent despot of high intelligence, while admitting that the proper end of scientific legislation is to promote the greatest happiness of the greatest number, might contend that the mass of his people, owing to ignorance and prejudice, did not understand their own interests, and might go on to maintain and act on the principle, that as his

subjects were neither the best judges of the conditions which constituted happiness, nor understood the means by which these conditions were to be attained, it was his duty to enforce upon them laws which, though they might diminish individual liberty, were likely nevertheless to ensure the well-being of his people. This position is not in itself illogical; it was held by the benevolent despots of the eighteenth century, and would have commended itself to so acute a thinker as Voltaire, for we may assume with confidence that he would not have condemned a ruler who by severe legislation overthrew the reign of superstition or intolerance. But, though *laissez faire* is not an essential part of utilitarianism, it was practically the most vital part of Bentham's legislative doctrine, and in England gave to the movement for the reform of the law both its power and its character. At the time when Bentham became the preacher of legislative utilitarianism the English people were proud of their freedom, and it was the fashion to assert, that under the English constitution no restraint was placed on individual liberty which was not requisite for the maintenance of public order. Bentham saw through this cant, and perceived the undeniable truth, that, under a system of ancient customs modified by haphazard legislation, unnumbered restraints were placed on the action of individuals, and restraints which were in no sense necessary for the safety and good order of the community at large, and he inferred at once that these restraints were evils.

DILLON, LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA, 339–342.

Passing from these general considerations, I proceed to notice specifically two other subjects. One is Bentham's reforms in the Law of Evidence. Here the direct fruits of Bentham's labors are plainly to be seen. In some respects his "Judicial Evidence," before mentioned, is the most important of all his censorial writings on English law. In this work he exposed the absurdity and perniciousness of many of the established technical rules of evidence. "In certain cases," he says, "jurisprudence may be defined, the art of being methodically ignorant of what everybody knows." Among the rules combated were those relating to the competency of witnesses and the exclusion of evidence on various grounds, including that of pecuniary interest. He insisted that these rules frequently caused the miscarriage of justice, and that in the interest of justice they ought to be swept away. His reasoning fairly

embraces the doctrine that parties ought to be allowed, and even required, to testify. This work appeared in Paris in 1802, and in England in 1825 and 1827; but it produced no immediate effect on the professional mind. It was generally regarded as the speculations of a visionary. As I write I have before me Starkie's *Evidence*, the third edition of which appeared in 1842, and the wisdom of the exclusionary rules of evidence are not so much as criticised or questioned.

But Bentham had set a few men thinking. He had scattered the seeds of truth. Though they fell on stony ground they did not all perish. But verily, reform is a plant of slow growth in the sterile gardens of the practising and practical lawyer. Bentham lived till 1832, and these exclusionary rules still held sway. But in 1843, by Lord Denman's Act, interest in actions at common law ceased, as a rule, to disqualify; and in 1846 and 1851, by Lord Brougham's Acts, parties in civil actions were as a rule made competent and compellable to testify. I believe I speak the universal judgment of the profession when I say that changes more beneficial in the administration of justice have rarely taken place in our law, and that it is a matter of profound amazement, as we look back upon it, that these exclusionary rules ever had a place therein, and especially that they were able to retain it until within the last fifty years.

Let us be just. The credit of originating this great improvement is due not to Denman and Brougham, but it essentially belongs to Bentham although he was in his grave before it was actually effected. Mr. Justice Stephen forcibly remarks of Bentham's assault on the system of judicial evidence that "it was like the bursting of a shell in the powder magazine of a fortress, the fragments of the shell being lost in the ruin which it has wrought." The moral is obvious. The philosophic student of our laws may often have a keener and juster insight into their vices and imperfections than the practising lawyer, whose life and studies are exclusively confined to the ascertainment and application of the law as it is, and who rarely vexes himself with the question of what it ought to be, or makes any serious effort to reform it. But let me not be misunderstood. While the philosophic student is able to point out defects in the laws, yet the history of the law shows that only practical lawyers are capable of satisfactorily executing the work of reform. Bentham's failure in *directly* realizing greater practical results grew out of his mistaken notion that the work of

actual amendment could be accomplished without experts, — that is, without the aid of the bar and without its active support.

Extracts from A CENTURY OF LAW REFORM (1901). [These extracts are from the Introductory Lecture of Dr. Odgers.]

We find since 1800 a marked improvement both in the substance of our criminal law and in the whole tone of its administration. In the year 1800 there were more than 200 crimes punishable with death! Of these more than two-thirds had been made capital during the eighteenth century. Sir Samuel Romilly asserted that there was no other country in the world "where so many and so large a variety of actions were punishable by loss of life." Nearly all felonies were capital. If a man falsely pretended to be a Greenwich pensioner, he was hanged. If he injured a county bridge, or cut down a young tree, he was hanged. If he forged a bank note, he was hanged. If he stole property valued at five shillings; if he stole anything above the value of one shilling from the person; if he stole anything at all, whatever its value, from a bleaching ground; he was hanged. If a convict returned prematurely from transportation; or if a soldier or sailor wandered about the country begging without a pass; he was hanged. And these barbarous laws were relentlessly carried into execution. A boy only ten years old was sentenced to death in 1816; whether he was actually executed I can not say.

Thanks to Sir Samuel Romilly, and later to Sir James Mackintosh, the number of capital offences was gradually reduced; and now we have but four crimes punishable with death, two of which very rarely occur. In 1800, too, our prisons were sinks of iniquity and disease; the gaolers feared to enter a cell lest they should catch gaol fever; and a sentence of imprisonment was often a sentence to death. Now great care is taken of the health and morals of our convicts in prison. And a criminal trial now is conducted in a very different fashion from a trial in 1800. The prisoner now is treated with the utmost fairness and consideration.

In Common Law, and in the procedure of the Courts which enforce it, many great changes have taken place during the century. Of course a contract is much the same now as it was in 1800. But in 1800 no contracts, except negotiable instruments, were assignable. Only the original parties to a contract could sue on it. Now the benefit of nearly every contract is assignable. On the other hand, wagering contracts in 1800 could be enforced in the courts of law;

and all sorts of extraordinary actions were the results. If a bet was made, not upon any illegal sport, or any game or race, the result was a legal debt, for which an action would lie; and such actions were solemnly tried in open court. This was put to an end by an Act passed in 1845.

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With a few exceptions, the principles of law applicable to torts remain much as they were in 1800. The most marked change was made by Lord Campbell's Fatal Accidents Act, 1846. As the law stood in 1800, if a passenger was upset in a stage-coach and his leg broken, he could sue the proprietor and recover damages for the pain which he had suffered, the injury done him, and the medical and other expenses which had been incurred. But if he was killed outright by the accident, his family and his executors had no redress whatever. They could not even recover his funeral expenses! His right of action was said to be personal and to have died with him. So it was a bad thing pecuniarily for the proprietor of a stage-coach, if his passengers recovered from their injuries; it was to his advantage, if there was to be an accident at all, that they should all break their necks. This was put a stop to by Lord Campbell's Act in 1846.

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The principles of equity have not materially changed since 1800. What was a breach of trust then is a breach of trust now, though great and much-needed relief has been afforded to trustees by enabling them to plead the Statute of Limitations in many cases where their default was not fraudulent. The rules laid down by Lord Eldon in *Ellison* v. *Ellison* are still applied in cases of Voluntary Trusts. The law as to constructive notice declared by Lord Hardwicke in *Le Neve* v. *Le Neve* and other cases endured till 1882, when it was modified by the Conveyancing Act. The old doctrines of the Courts of Equity as to conversion and election, ademption of legacies, priority of mortgages, and marshalling assets, remain substantially in force to this day; though the rules relating to the administration of the estates of deceased persons have been altered by many statutes.

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In the law of real property, on the other hand, changes of enormous importance have been made during the century.

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In conveyancing, too, the changes have been equally startling. In 1800 no man could convey to another freehold land in possession by a simple deed. Such land did not lie in grant. Either the purchaser and the vendor had to visit the spot and go through the elaborate ceremony of a feoffment with livery of seisin; or, what was more usual, the parties had recourse to the device of creating an unnecessary tenancy by means of a Lease and then supplementing it by a subsequent Release — two deeds and double the cost. An end was put to this in 1845. Fines and recoveries were abolished in 1833. Since then title-deeds themselves have been so shortened and simplified by the Conveyancing Acts that they no longer deserve Lord Westbury's severe censure. You remember that he spoke of title deeds, as being "difficult to read, impossible to understand, and disgusting to touch."

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In 1800 there was no such thing as an ordinary limited liability company. There were a few trading companies each incorporated by its own private Act of Parliament. But apart from these, every trading concern in which more than one man was interested was just a common law partnership, and each partner was personally liable for the whole of the debts of the firm. Now any one can take as many shares as he likes in a limited liability company, and as soon as he has paid for his shares in full he is free from all further liability to the creditors of the company. Whether the change was a good one or a bad one, it is hard to say. It has no doubt greatly encouraged and facilitated commercial enterprise; it has carried British capital into every corner of the inhabitated globe.

There was no Bankruptcy Court in 1800. Bankruptcy was originally regarded as a crime; in the earliest Bankruptcy Acts the bankrupt is always alluded to as "the offender." But before 1800 bankruptcy had come to be regarded as the proper remedy for traders in embarrassed circumstances. But this relief was limited to "traders"; no one else could avail himself of the Bankruptcy Laws. A private gentleman, an attorney, a solicitor, a stockbroker, a farmer, or a grazier, was not a trader, nor was any labourer or workman. If any of these persons could not pay his just debts, he had to rot in the Marshalsea or the Fleet till his friends or relatives took pity on him and found the money. This was then the deliberate policy of our law, that if a man was hopelessly in debt he must be locked up and deprived of all chance of earning any

money with which to pay his creditors! The creditor seized his body in satisfaction of the debt. This is the state of things which Dickens so powerfully describes in *Pickwick* and in *Little Dorrit*. Nor does he exaggerate in the least. You can learn a great deal of law from Dickens' novels. And remember that he was a student of the Middle Temple, though he was never called to the bar.

The first step for the relief of these insolvent debtors was taken in 1808, when an Act was passed exempting from imprisonment in certain cases judgment debtors who had been taken in execution for any debt or damages not exceeding £20, exclusive of costs. Other statutes followed in 1844, 1845, and 1846.

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And there was no Divorce Court in 1800. At the commencement of the century, the marriage bond could be severed by nothing less than an Act of Parliament. That is still, I believe, the law of Ireland, which is still without a Divorce Court. And before asking for an Act of Parliament, the injured husband was required, first, to sue the adulterer at law and obtain a verdict against him for damages, and then to take proceedings in an Ecclesiastical Court for a decree of divorce *a mensa et thoro*. When he had succeeded in these two Courts, he might commence his application to Parliament. In other words, only a very wealthy man could obtain a divorce in England in 1800.

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Next to lunatics, our polite text-book writers always place married women! And great indeed are the changes that have been made in this branch of our law. In 1800 a married woman had scarcely any rights; she could make no contracts, acquire no personal property, and all her earnings belonged to her husband. Such at least was the rule at law. In equity it was possible for a woman to have a marriage settlement executed before marriage, and thus preserve her property to her sole and separate use. The first few years of the new century witnessed two decisions which established for the first time the right of a married woman who had married without a settlement to have some portion of her own personal property settled upon herself and her children. Now a wife is in a position of almost complete equality with her husband. An entire change has been introduced by the Married Women's Property Acts of 1870, 1874, 1882, and 1893. A married woman now can make a contract with reference to her

separate property just as though she were unmarried; she can sell it or dispose of it by will; her earnings are her own.

Note. — In addition to Jeremy Bentham (1748–1835), the following names deserve to be remembered in connection with the Reform Movement:

Sir Samuel Romilly (1757–1818), was Solicitor General in 1806. He sat in Parliament from that date till his death and devoted himself to reform of Criminal Law.

Henry Brougham, afterwards Lord Brougham and Vaux (1778–1868), after a brilliant career at the bar, became Chancellor in 1830, holding that office four years. Sitting in the House of Commons from 1815 to 1830, he was one of the most effective and energetic of the champions of Law Reform.

Henry Bickersteth, afterwards Lord Langdale (1783–1851), was called to the bar in 1811, and became Master of the Rolls in 1835. Bentham said of him, "Of all my friends Bickersteth was the most cordial to Law Reform to its utmost extent."

David Dudley Field (1805–1894), the foremost advocate of Law Reform in America, was admitted to the bar in New York in 1828 and began to write upon Reform of Procedure in 1839. In 1847 the legislature of New York appointed him upon the commission which prepared the Code of Civil Procedure in which he took a leading part. Codes based upon it are now in force in twenty-seven states. In 1857 he was placed at the head of a new commission, which prepared three codes, a political code (public law), a civil code (private law), and a penal code. Ten states have adopted the last, and California has adopted the three. These codes were also adopted by and are in force in Idaho, Montana, North Dakota and South Dakota.

DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND, 62–65.

The nineteenth century falls into three periods, during each of which a different current or stream of opinion was predominant, and in the main governed the development of the law of England.

I. *The Period of Old Toryism or Legislative Quiescence* (1800–1830).

This was the era of Blackstonian optimism reinforced, as the century went on, by Eldonian toryism or reaction; it may be termed the period of legislative quiescence, or (in the language of censors) stagnation. Political or legislative changes were first checked by that pride in the English constitution, and intense satisfaction with things as they were, which was inherited from a preceding generation, and is best represented by the studied optimism of Blackstone; they were next arrested by that reaction against Jacobinism and revolutionary violence which is represented by the legislative timidity of Lord Eldon; he devoted his great intellectual powers (which hardly receive justice from modern critics) at once to

the cautious elaboration of the doctrines of equity, and to the obstruction of every other change or improvement in the law. The reactionary character of this period increased rather than diminished as the century advanced. The toryism of 1815 or 1817 was less intelligent and more violent than the toryism of 1800. Laws passed during this period, and especially during the latter part thereof, assumed a deliberately reactionary form, and were aimed at the suppression of sedition, of Jacobinism, of agitation, or of reform. But though it is easy to find examples of reactionary legislation, the true characteristic of the time was the prevalence of quiescence or stagnation. Optimism had at least as much to do with the condition of public sentiment as had the dread of revolutionary propagandism.

II. *The Period of Benthamism or Individualism* (1825–1870).

This was the era of utilitarian reform. Legislation was governed by the body of opinion, popularly, and on the whole rightly, connected with the name of Bentham. The movement of which he, if not the creator, was certainly the prophet, was above all things a movement for the reform of the law. Hence it has effected, though in very different degrees, every part of the law of England. It has stimulated the constant activity of Parliament, it has swept away restraints on individual energy, and has exhibited a deliberate hostility to every historical anomaly or survival, which appeared to involve practical inconvenience, or in any way to place a check on individual freedom.

III. *Period of Collectivism* (1865–1900).[1]

By collectivism is here meant the school of opinion often termed (and generally by more or less hostile critics) socialism, which favors the intervention of the State, even at some sacrifice of individual freedom, for the purpose of conferring benefit upon the mass of the people. This current of opinion cannot, in England at any rate, be connected with the name of any one man, or even with the name of any one definite school. It has increased in force and volume during the last half of the nineteenth century, nor does observation justify the expectation that in the sphere of legislation, or elsewhere, its strength is spent or its influence on the wane.

[1] The period of collectivist legislation begins much later in the United States. On the whole the beginning may be fixed at about 1890.

The practical tendencies of this movement of opinion in England are best exemplified in our labor laws, and by a large amount of legislation which, though it cannot be easily brought under one head, is, speaking broadly, intended to regulate the conduct of trade and business in the interest of the working classes, and, as collectivists believe, for the benefit of the nation.

DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND, 258–259.

(A) Principles of Collectivism.

The fundamental principle which is accepted by every man who leans towards any form of socialism or collectivism, is faith in the benefit to be derived by the mass of the people from the action or intervention of the State even in matters which might be, and often are, left to the uncontrolled management of the persons concerned.

This doctrine involves two assumptions: the one is the denial that *laissez faire* is in most cases, or even in many cases, a principle of sound legislation; the second is a belief in the benefit of governmental guidance or interference, even when it greatly limits the sphere of individual choice or liberty. These assumptions — the one negative, the other positive — are logically distinguishable, and, as a matter of reasoning, belief in the one does not of necessity involve belief in the other.

This fundamental doctrine, however, is of too abstract a nature to tell much upon the course of legislation, at any rate where the lawmakers are Englishmen. The importance of its general, even though tacit, acceptance lies, as regards the development of English law, in the support which it has given to certain subordinate principles or tendencies which immediately affect legislation. These may conveniently be considered under four heads: — the Extension of the Idea of Protection; — the Restriction on Freedom of Contract; — the Preference for Collective as contrasted with Individual Action, especially in the matter of Bargaining; — the Equalisation of Advantages among individuals possessed of unequal means for their attainment. A given law, it should be remembered, may easily be the result of more than one of these tendencies, which indeed are so closely inter-connected that they ought never, even in thought, to be separated from one another by any rigid line of demarcation.

CHAPTER III

SOURCES AND FORMS OF LAW[1]

SALMOND, JURISPRUDENCE, sec. 31.

The expression source of law (*fons juris*), has several meanings which it is necessary to distinguish clearly. We must distinguish in the first place between the formal and the material sources of the law. A formal source is that from which a rule of law derives its force and validity. It is that from which the authority of the law proceeds. The material sources, on the other hand, are those from which is derived the matter, not the validity of the law. The material source supplies the substance of the rule to which the formal source gives the force and nature of law.

The formal source of the whole body of the civil law is one and the same, namely, the will and power of the state as manifested in courts of justice. Whatever rules have the sanction and authority of the body politic in the administration of justice have thereby the force of law; and in such force no other rules whatever have any share. The matter of the law may be drawn from all kinds of material sources, but for its legal validity it must look to the tribunals of the state and to them alone. Customary law, for example, has its material source in the usages of those who are subject to it; but it has its formal source in the will of the state, no less than statutory law itself.

We may conveniently distinguish the two ideas by the terms "sources of law" and "forms of law." By sources of law, we refer to the methods and agencies by which rules of law are formulated; by forms of law, we refer to the modes in which the rules are expressed — the literary shapes they assume.

In the common-law system there are three forms of law:

(1) Legislation, under which, using the term in its wider sense, we have in America three varieties:

i. constitutions.
ii. federal treaties.
iii. statutes, { federal. / state.

(2) Judicial Decisions. The decisions of the superior courts in England and their analogues in other common-law jurisdictions.

(3) Books of Authority.

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[1] Gray, Nature and Sources of Law, Chaps. VIII–XIII; Austin, Jurisprudence, Lects. 18–39; Holland, Jurisprudence, Chap. V; Pollock, First Book of Jurisprudence, Part II.

LEGISLATION

BLACKSTONE, COMMENTARIES, I, 63.

The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.[1]

The *lex non scripta*, or unwritten law, includes not only general customs, or the common law properly so called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptae*, I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth. It is true indeed that in the profound ignorance of letters, which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, because the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallic Druids committed all their laws as well as learning to memory; and it is said of the primitive Saxons here, as well as their brethren on the Continent, that *leges sola memoria et usu retinebant.* But with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.

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[1] On the distinction between written law and unwritten law see Gray, Nature and Sources of Law, §§ 342–346; Clark, Practical Jurisprudence, 266–272; Pollock, First Book of Jurisprudence, Part II, Chap. I; Austin, Jurisprudence, Lect. 28.

BLACKSTONE, COMMENTARIES, I, 85–91.

Let us next proceed to the *leges scriptae*, the written laws of the kingdom, which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in parliament assembled. The oldest of these now extant, and printed in our statute books, is the famous magna charta, as confirmed in parliament 9 Hen. III., though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take notice of the different kinds of statutes, and of some general rules with regard to their construction.

First, as to their several kinds. Statutes are either general or special, public or private. A general or public act is an universal rule, that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio;* without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans entitled *senatus decreta*, in contradistinction to the *senatus consulta*, which regarded the whole community; and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded. Thus, to show the distinction, the statute 13 Eliz. c. 10, to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation; but an act to enable the bishop of Chester to make a lease to A. B. for sixty years is an exception to this rule; it concerns only the parties and the bishop's successors; and is therefore a private act.

Statutes also are either declaratory of the common law, or remedial of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, in *perpetuum rei testimonium*, and for avoiding all doubts and difficulties, to declare

what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III. cap. 2, doth not make any new species of treasons, but only, for the benefit of the subject, declares and enumerates those several kinds of offence which before were treason at the common law. Remedial statutes are those which are made to supply such defects, and abridge such superfluities in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law, where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into enlarging and restraining statutes. To instance again in the case of treason; clipping the current coin of the kingdom was an offence not sufficiently guarded against by the common law; therefore it was thought expedient, by statute 5 Eliz. c. 11, to make it high treason, which it was not at the common law: so that this was an enlarging statute. At common law also spiritual corporations might lease out their estates for any term of years, till prevented by the statute of 13 Eliz. before mentioned: this was, therefore, a restraining statute.

Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.

1. There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy, that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy. Let us instance again in the same restraining statute of 13 Eliz. c. 10: By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors; the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives, or twenty-one years. Now, in the construction of this statute, it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see; or, if made by a

dean and chapter, they are not void during the continuance of the dean; for the act was made for the benefit and protection of the successor. The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; but the leases, during their continuance, being not within the mischief, are not within the remedy.

2. A statute, which treats of things or persons of an inferior rank, cannot by any general words be extended to those of a superior. So a statute treating of "deans, prebendaries, parsons, vicars, and others having spiritual promotion," is held not to extend to bishops, though they have spiritual promotion, deans being the highest persons named, and bishops being of a still higher order.

3. Penal statutes must be construed strictly. Thus the statute I Edw. VI. c. 12, having enacted that those who are convicted of stealing horses should not have the benefit of clergy, the judges conceived that this should not extend to him that should steal but one horse, and therefore procured a new act for that purpose in the following year. And, to come nearer our own times, by the statute 14 Geo. II. c. 6, stealing sheep, or other cattle, was made felony, without benefit of clergy. But these general words, "or other cattle," being looked upon as much too loose to create a capital offence, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. c. 34, extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.

4. Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken, where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz. c. 5, which avoids all gifts of goods, etc., made to defraud creditors and others, was held to extend by the general words to a gift made to defraud the queen of a forfeiture.

5. One part of a statute must be so construed by another, that the whole may (if possible) stand: *ut res magis valeat, quam pereat.* As if land be vested in the king and his heirs by act of parliament

saving the right of A. and A. has at that time a lease of it for three years: here A. shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But,

6. A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever; or vests the land of A. in the king, saving the right of A.; in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king.

7. Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon a general principle of universal law, that "*leges posteriores priores contrarias abrogant:*" consonant to which it was laid down by a law of the twelve tables at Rome, that "*quod populus postremum jussit, id jus ratum esto.*" But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter-sessions, and a latter law makes the same offence indictable at the assizes, here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offence shall be indictable at the assizes, and not elsewhere.

8. If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII. declaring the king to be the supreme head of the church, were repealed by a statute 1 and 2 Philip and Mary, and this latter statute

was afterwards repealed by an act of 1 Eliz. there needed not any express words of revival in Queen Elizabeth's statute, but these acts of King Henry were impliedly and virtually revived.

9. Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavor to tie up the hands of succeeding legislatures. "When you repeal the law itself, (says he,) you at the same time repeal the prohibitory clause, which guards against such repeal."

10. Lastly, acts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.[1] I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it. Thus if an act of parliament gives a man power to try all causes that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not

[1] See Coxe, Judicial Power and Unconstitutional Legislation, 73–74, 172–178.

to extend to that, because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

KENT, COMMENTARIES, I, 454–468.

A statute, when duly made, takes effect from its date, when no time is fixed, and this is now the settled rule. It was so declared by the Supreme Court of the United States in *Matthews* v. *Zane*, and it was likewise so adjudged in the Circuit Court in Massachusetts, in the case of *The Brig Ann*. I apprehend that the same rule prevails in the courts of the several states, and that it cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of *Dash* v. *Van Kleeck*, and shown to be founded not only in English law, but on the principles of general jurisprudence. A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights, as a statute to confirm former marriages defectively celebrated, or a sale of lands defectively made or acknowledged. The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. But the cases cannot be extended beyond the circumstances on which they repose,

without putting in jeopardy the energy and safety of the general principles.

The English rule formerly was, that if no period was fixed by the statute itself, it took effect by relation, from the first day of the session in which the act was passed, and which might be some weeks, if not months, before the act received the royal sanction, or even before it had been introduced into Parliament. This was an extraordinary instance of the doctrine of relation, working gross injustice and absurdity; and yet we find the rule declared and uniformly adhered to, from the time of Henry VI. All the judges agreed, in the case of *Partridge* v. *Strange*, in the 6th Edward VI., that the statute was to be accounted in law a perfect act from the first day of the session; and all persons were to be punished for an offence done against it after the first day of the session unless a certain time was appointed when the act should take effect. In the case of *The King* v. *Thurston*, this doctrine of carrying a statute back by relation to the first day of the session was admitted in the K. B.; though the consequence of it was to render an act murder which would not have been so without such relation. The case of *The Attorney-General* v. *Panter* is another strong instance of the application of this rigorous and unjust rule of the common law, even at so late and enlightened a period of the law as the year 1772. An act for laying a duty on the exportation of rice thereafter to be exported, received the royal assent on the 29th of June, 1767, and on the 10th of June of that year the defendants had exported rice. After the act passed, a duty of one hundred and fifteen pounds was demanded upon the prior exportation, and it was adjudged, in the Irish Court of Exchequer, to be payable. The cause was carried by appeal to the British House of Lords, on the ground of the palpable injustice of punishing the party for an act innocent and lawful when it is done; but the decree was affirmed, upon the opinion of the twelve judges, that the statute, by legal relation, commenced from the first day of the session. The K. B., also, in *Latless* v. *Holmes*, considered the rule to be too well settled to be shaken, and that the court could not take notice of the great hardship of the case. The voice of reason at last prevailed; and by the statute of 33 Geo. III. c. 13, it was declared that statutes are to have effect only from the time they receive the royal assent; and the former rule was abolished, to use the words of the statute, by reason of "its great and manifest injustice."

There is a good deal of hardship in the rule as it now stands, both here and in England; for a statute is to operate from the very day it passes, if the law itself does not establish the time. It is impossible in any state, and particularly in such a wide-spread dominion as that of the United States, to have notice of the existence of the law, until some time after it has passed. It would be no more than reasonable and just, that the statute should not be deemed to operate upon the persons and property of individuals, or impose pains and penalties for acts done in contravention of it, until the law was duly promulgated. The rule, however, is deemed to be fixed beyond the power of judicial control, and no time is allowed for the publication of the law before it operates, when the statute itself gives no time. Thus, in the case of *The Brig Ann*, the vessel was libelled and condemned for sailing from Newburyport, in Massachusetts, on the 12th of January, 1808, contrary to the act of Congress of the 9th of January, 1808, though it was admitted the act was not known in Newburyport on the day the brig sailed. The court admitted that the objection to the forfeiture of the brig was founded on the principles of good sense and natural equity; and that unless such time be allowed as would enable the party, with reasonable diligence, to ascertain the existence of the law, an innocent man might be punished in his person and property for an act which was innocent, for aught he knew, or could by possibility have known, when he did it.

The *Code Napoleon* adopted the true rule on this subject. It declared that laws were binding from the moment their promulgation could be known, and that the promulgation should be considered as known in the department of the imperial residence one day after that promulgation, and in each of the other departments of the French empire after the expiration of the same space of time, augmented by as many days as there were distances of twenty leagues between the seat of government and the place. The New York Revised Statutes have also declared the very equitable rule that every law, unless a different time be prescribed therein, takes effect throughout the state on, and not before, the 20th day after the day of its final passage.

If the statute be constitutional in its character, and has duly gone into operation, the next inquiry is respecting its meaning; and this leads us to a consideration of the established rules of construction, by which its sense and operation are to be understood.

There is a material distinction between public and private statutes, and the books abound with cases explaining this distinction in its application to particular statutes. It is sometimes difficult to draw the line between a public and private act, for statutes frequently relate to matters and things that are partly public and partly private. The most comprehensive, if not the most precise, definition in the English books is, that public acts relate to the kingdom at large, and private acts concern the particular interest or benefit of certain individuals or of particular classes of men. Generally speaking, statutes are public; and a private statute may rather be considered an exception to a general rule. It operates upon a particular thing or private persons. It is said not to bind or include strangers in interest to its provisions, and they are not bound to take notice of a private act, even though there be no general saving clause of the rights of third persons. This is a safe and just rule of construction; and it was adopted by the English courts in very early times, and does great credit to their liberality and spirit of justice. It is supported by the opinion of Sir Matthew Hale, in *Lucy* v. *Levington*, where he lays down the rule to be that though every man be so far a party to a private act of Parliament as not to gainsay it, yet he is not so far a party as to give up his interest. To take the case stated by Sir Matthew Hale, suppose a statute recites that whereas there was a controversy concerning land between A. and B., and enacts that A. shall enjoy it, this would not bind the interest of third persons in that land, because they are not strictly parties to the act, but strangers; and it would be manifest injustice that the statute should affect them. This rule, as to the limitation of the operation of private statutes, was adopted by the Supreme Court of New York, and afterwards by the Court of Errors, in *Jackson* v. *Catlin*. It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication. There is another material distinction in respect to public and private statutes. The courts of justice are bound, *ex officio*, to take notice of public acts without their being pleaded, for they are part of the general law of the land, which all persons, and particularly the judges, are presumed to know. Public acts cannot be put in issue by plea. *Nul tiel record* cannot be pleaded to a public statute; the judges are to determine the existence of them from their own knowledge.

But they are not bound to take notice of private acts, unless they be specially pleaded, and shown in proof, by the party claiming the effect of them. In England the existence even of a private statute cannot be put in issue to be tried by a jury on the plea of *nul tiel record*, though this may be done in New York under the Revised Statutes.

The title of the act and the preamble to the act, are, strictly speaking, no parts of it. They may serve to show the general scope and purport of the act, and the inducements which led to its enactment. They may, at times, aid in the construction of it; but generally they are loosely and carelessly inserted, and are not safe expositors of the law. The title frequently alludes to the subject-matter of the act only in general or sweeping terms, or it alludes only to a part of the multifarious matter of which the statute is composed. The constitution of New Jersey, in 1844, has added a new and salutary check to multitudinous matter, by declaring that every law shall embrace but one object, and that shall be expressed in the title. So also in New York, by the revised constitution of 1846, art. 3, sec. 16, no private or local bill shall embrace more than one subject, and that shall be expressed in the title. The title, as it was observed in *United States* v. *Fisher*, when taken in connection with other parts, may assist in removing ambiguities where the intent is not plain; for when the mind labors to discover the intention of the legislature, it seizes everything, even the title, from which aid can be derived. So the preamble may be resorted to in order to ascertain the inducements to the making of the statute; but when the words of the enacting clause are clear and positive, recourse must not be had to the preamble. Notwithstanding that Lord Coke considers the preamble as a key to open the understanding of the statute, Mr. Barrington, in his *Observations on the Statutes*, has shown, by many instances, that a statute frequently recites that which is not the real occasion of the law, or states that doubts existed as to the law, when in fact none had existed. The true rule is, as was declared by Mr. J. Buller and Mr. J. Grose, in *Crespigny* v. *Wittenoom*, that the preamble may be resorted to in restraint of the generality of the enacting clause, when it would be inconvenient if not restrained, or it may be resorted to in explanation of the enacting clause, if it be doubtful. This is the whole extent of the influence of the title and preamble in the construction of the statute. The true meaning of the statute is generally and properly to be sought from the

body of the act itself. But such is the imperfection of human language, and the want of technical skill in the makers of the law, that statutes often give occasion to the most perplexing and distressing doubts and discussions, arising from the ambiguity that attends them. It requires great experience, as well as the command of a perspicuous diction, to frame a law in such clear and precise terms as to secure it from ambiguous expressions, and from all doubt, and criticism upon its meaning.

It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression in a statute is special or particular, but the reason is general, the expression should be deemed general. *Scire leges, non hoc est verba earum tenere sed vim ac potestatem*, and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity. This was the doctrine of Modestinus, Scævola, Paulus, and Ulpianus, the most illustrious commentators on the Roman law. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion. These rules, by which the sages of the law, according to Plowden, have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation of ages.

The words of a statute, if of common use, are to be taken in their natural, plain, obvious, and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptation. The current of authority at the present day, said Mr. Justice Bronson, is in favor of reading statutes according to the natural and most obvious import of the language, without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation. A saving clause in a statute is to be rejected, when it is directly repugnant to the purview or body of the act, and could not

stand without rendering the act inconsistent and destructive of itself. Lord Coke, in *Alton Wood's Case*, gives a particular illustration of this rule, by a case which would be false doctrine with us, but which serves to show the force of the rule. Thus, if the manor of Dale be by express words given by statute to the king, saving the right of all persons interested therein, or if the statute vests the lands of A. in the king, saving the rights of A., the interest of the owner is not saved, inasmuch as the saving clause is repugnant to the grant; and if it were allowed to operate, it would render the grant void and nugatory. But there is a distinction in some of the books between a saving clause and a proviso in the statute, though the reason of the distinction is not very apparent. It was held by all the barons of the Exchequer, in the case of *The Attorney-General* v. *The Governor and Company of Chelsea Waterworks*, that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand, and be held a repeal of the purview, because it speaks the last intention of the lawgiver. It was compared to a will, in which the latter part, if inconsistent with the former, supersedes and revokes it. But it may be remarked upon this case of *Fitzgibbon*, that a proviso repugnant to the purview of the statute renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one, and not by the other, or why the proviso and the saving clause, when inconsistent with the body of the act, should not both of them be equally rejected. There is also a technical distinction between a proviso and an exception in a statute. If there be an exception in the enacting clause of a statute, it must be negatived in pleading; but if there be a separate proviso, that need not, and the defendant must show it by way of defence.

Several acts in *pari materia*, and relating to the same subject, are to be taken together, and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system. This rule was declared in the cases of *Rex* v. *Loxdale*, and *The Earl of Ailesbury* v. *Pattison;* and the rule applies, though some of the statutes may have expired, or are not referred to in the other acts. The object of the rule is to ascertain and carry into effect the intention; and it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Upon the same principle, whenever a power is given by a statute, everything necessary to

the making of it effectual or requisite to attain the end is implied. *Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.*

Statutes are likewise to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. This has been the language of the courts in every age; and when we consider the constant vehement and exalted eulogy which the ancient sages bestowed upon the common law as the perfection of reason, and the best birthright and noblest inheritance of the subject, we cannot be surprised at the great sanction given to this rule of construction. It was observed by the judges, in the case of *Stowell* v. *Zouche*, that it was good for the expositors of a statute to approach as near as they could to the reason of the common law; and the resolution of the barons of the Exchequer, in Heydon's case, was to this effect. For the sure and true interpretation of all statutes, whether penal or beneficial, four things are to be considered: What was the common law before the act; what was the mischief against which the common law did not provide; what remedy the Parliament had provided to cure the defect; and the true reason of the remedy. It was held to be the duty of the judges to make such a construction as should repress the mischief and advance the remedy.

In the construction of statutes, the sense which the contemporary members of the profession had put upon them is deemed of some importance, according to the maxim that *contemporanea expositio est fortissima in lege.* Statutes that are remedial, and not penal, are to receive an equitable interpretation, by which the letter of the act is sometimes restrained, and sometimes enlarged, so as more effectually to meet the beneficial end in view, and prevent a failure of the remedy. They are construed liberally, and *ultra* but not *contra* the strict letter. This may be illustrated in the case of the registry acts, for giving priority to deeds and mortages, according to the dates of the registry. If a person claiming under a registered deed or mortgage had notice of the unregistered prior deed when he took his deed, and procured the registry of it in order to defeat the prior deed, he shall not prevail with his prior registry, because that would be to counteract the intent and policy of the statutes, which were made to prevent and not to uphold frauds. Statutes are sometimes merely directory, and, in that case, a breach of the

direction works no forfeiture or invalidity of the thing done; but it is otherwise if the statute be imperative.

If an act be penal and temporary by the terms or nature of it, the party offending must be prosecuted and punished before the act expires or is repealed. Though the offence be committed before the expiration of the act, the party cannot be punished after it has expired, unless a particular provision be made by law for the purpose. If a statute be repealed, and afterwards the repealing act be repealed, this revives the original act; and if a statute be temporary, and the statute be repealed, and afterwards the repealing act be repealed, this revives the original act; and if a statute be temporary, and limited to a given number of years, and expires by its own limitation, a statute which had been repealed and supplied by it is *ipso facto* revived. If, before the expiration of the time, a temporary statute be continued by another act, it was formerly a question under which statute acts and proceedings were to be considered as done. In the case of the College of Physicians it was declared, that if a statute be limited to seven years, and afterwards by another statute be made perpetual, proceedings ought to be referred to the last statute, as being the one in force. But this decision was erroneous, and contrary to what had been said by Popham, Ch. J., in *Dingley* v. *Moor*, and all acts civil and criminal, are to be charged under the authority of the first act. Thus, in the case of *Rex* v. *Morgan*, on an indictment for perjury, in an affidavit to hold to bail, it was laid to have been taken by virtue of the statute of 12 Geo. I., which was a temporary law for five years, and which was afterwards, and before the expiration of it, continued by the act of 5 Geo. II., with some alterations. Lord Chief Justice Hardwicke said, that when an act was continued by a subsequent act, everybody was estopped to say the first act was not in force; and as the act in question was not altered in respect to bail, the offence was properly laid to have been done against the first act. In *Shipman* v. *Henbest*, the King's Bench held, that if a statute be permitted even to expire, and be afterwards revived by another statute, the law derives its force from the first statute, which is to be considered in operation by means of revival. If, however, a temporary act be revived after it has expired, the intermediate time is lost, without a special provision reaching to the intermediate time.

If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no

prohibitory words in the statute. Lord Holt, in *Bartlett* v. *Viner*, applied this rule to the case of a statute inflicting a penalty for making a particular contract, such as a simoniacal or usurious contract; and he held that the contract was void under the statute, though there was a penalty imposed for making it. The principle is now settled, that the statutory prohibition is equally efficacious, and the illegality of a breach of the statute the same whether a thing be prohibited absolutely or only under a penalty. The New York Revised Statutes make the doing an act contrary to a statute prohibition a misdemeanor, though no penalty be imposed. Whether any other punishment can be inflicted than the penalty given by the statute has been made a serious question. The Court of K. B., in *Rex* v. *Robinson*, laid down this distinction, that where a statute created a new offence, by making unlawful what was lawful before, and prescribed a particular sanction, it must be pursued, and none other; but where the offence was punishable at common law, and the statute prescribed a particular remedy, without any negative words, express or implied, the sanction was cumulative, and did not take away the common-law punishment, and either remedy might be pursued. The same distinction had been declared long before; and the proper inquiry in such cases is, was the doing of the thing for which the penalty is inflicted lawful or unlawful before the passing of the statute? If it was no offence before, the party offending is liable to the penalty, and to nothing else. The distinction between statutory offences, which are *mala prohibita* only, or *mala in se*, is now exploded, and a breach of the statute law, in either case, is equally unlawful and equally a breach of duty; and no agreement founded on the contemplation of either class of offences will be enforced at law or in equity.

There are a number of other rules of minor importance, relative to the construction of statutes, and it will be sufficient to observe, generally, that the great object of the maxims of interpretation is to discover the true intention of the law; and whenever that intention can be indubitably ascertained, and it be not a violation of constitutional right, the courts are bound to obey it, whatever may be their opinion of its wisdom or policy. But it would be quite visionary to expect, in any code of statute law, such precision of thought and perspicuity of language as to preclude all uncertainty as to the meaning, and exempt the community from the evils of vexatious doubts and litigious interpretations. Lord Coke complained, that in his day great questions had oftentimes arisen "upon

acts of Parliament, overladen with provisos and additions, and many times on a sudden penned or corrected, by men of none, or very little judgment in law."

When Statutes Take Effect:

(*a*) At common law. If no date was fixed in the statute, it took effect by relation from the first day of the session at which it was passed.

(*b*) In England. By a statute of George III., statutes take effect from the date when they receive the royal assent, unless a different date is fixed.

(*c*) Federal statutes. These take effect from the date of approval by the president, unless a different date is fixed.

(*d*) State statutes. This matter is governed by constitutional or statutory provisions in the several states, and there is no uniform rule. Most of the states provide a certain time after passage and approval at which statutes shall take effect.

JUDICIAL DECISIONS[1]

BLACKSTONE, COMMENTARIES, I, 69–72.

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to

[1] In this connection the student may read profitably Wambaugh, The Study of Cases. Reference may be made also to Black, Judicial Precedents.

conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England, that whenever a standing rule of law of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration. To illustrate this doctrine by examples. It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half brother, but it shall rather escheat to the king or other superior lord. Now this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions, and therefore can never be departed from by any modern judge without a breach of his oath and the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feodal law, may not be quite obvious to everybody. And therefore, though a modern judge, on account of a supposed hardship upon the half brother, might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was not law. So that the law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law": in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.

The decisions, therefore, of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the

numerous volumes of reports which furnish the lawyer's library. These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain the records which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second inclusive; and from this time to that of Henry the Eighth, were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown,[1] and published annually, whence they are known under the denomination of the year books. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day; for though King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief Justice Coke; a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name.

WILSON v. BUMSTEAD, SUPREME COURT OF NEBRASKA, 1881 (12 Nebr. 1).

Maxwell, J.: In the application of the principles of the common law, where the precedents are unanimous in the support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is no certainty in regard to what, upon a

[1] This tradition that the Year Books were the work of reporters appointed and paid by the crown seems to have been shown to have no foundation. But see the arguments on both sides stated in 27 Law Quart. Rev. 278.

given state of facts, the decision of the court will be. If the common law rule is inadequate, the proper course is by legislation, and such was the course pursued in this case. As no action would lie at common law, the remedy is entirely statutory, and the conditions, upon which the right to maintain the action rest, must be complied with.

ATTORNEY GENERAL v. LUM, SUPREME COURT OF WISCONSIN, 1853 (2 Wis. 507).

Smith, J.: This opinion of the Supreme Court, pronounced by the Chief Justice, would seem to be conclusive, as to the right here sought to be enforced. But it is contended that the opinions pronounced by the Supreme Court, are not of binding authority upon the Circuit Court, and it is intimated, that though inferior courts may treat such opinions never so contemptuously, yet the mere *remittitur* certified and transmitted by our clerk, is the only authoritative direction to the court below.

This is not the correct view of the law. It is not intended to be declared that all the reasoning, and instances of illustration, introduced in an opinion of this court, are to be adopted by inferior tribunals, from which cases, or matters may come here by appeal, writ of error, or otherwise; but it is insisted and declared that the opinion of the court upon the points in judgment, presented and passed upon in cases brought here for adjudication, are the law of the land, until overruled or otherwise annulled, and that inferior courts and tribunals must yield obedience to the law thus declared. We should be unfaithful to the high trust committed to us, should we fail to discharge this solemn duty of enforcing the law in this respect, upon the faithful and complete execution of which, the most sacred and vital rights of the citizen must frequently depend; and every inferior officer, judicial or ministerial, must know and be informed that such acquiescence and obedience will be rigidly exacted, and resistance will be most effectually subdued.

JOHNSON v. FALL, SUPREME COURT OF CALIFORNIA, 1856 (6 Cal. 359.)

The opinion of the Court was delivered by Mr. Justice Terry. Mr. Chief Justice Murray concurred.

At common law all wagers were recoverable, except such as were prohibited by law, were against public policy, or calculated to affect the interest, character or feelings of third parties. This principle is too well established to require either argument or authority. But

it is contended by counsel that, inasmuch as the English judges have uniformly looked with disfavor on this class of cases, and have frequently taken occasion to express their regret that a different rule had not been established, this Court should, as the question is for the first time presented in the State, without regard to precedent, declare all wagers illegal, on account of their manifest immoral tendency.

Such a course would, we conceive, be a usurpation of functions properly belonging to another department of government. The common law having been adopted as the rule of decision in this State, it is our duty to enforce it, leaving all questions of its policy, as applied to a particular class of contracts, for the consideration of the Legislature.

The questions which are made in the argument of counsel, as to the general utility of the work, which was the subject of the wager, its effect upon the interest of third parties, as well as the tendency of the wager to advance or retard such work, are, we conceive, questions of fact, which cannot properly be decided by a Court on demurrer.

The judgment of the Court below is reversed, and the cause remanded.

McDOWELL v. OYER, SUPREME COURT OF PENNSYLVANIA, 1853 (21 Pa. St. 417).

Black, C. J.: . . . The judgment we are about to give might well be rested on the mere authority of the cases I have cited. When a point has been solemnly ruled by the tribunal of the last resort, after full argument and with the assent of all the judges, we have the highest evidence which can be produced in favor of the unwritten law.

It is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge, and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance. It is absolutely necessary to the formation and permanence of any system of jurisprudence. Without it we may fairly be said to have no law; for law is a fixed and established rule, not depending in the slightest degree on the caprice of those who may happen to administer it. I take it that the adjudications of this Court, when they are free from absurdity, not mischievous in practice, and consistent with one another, are the law of the land. It is this law

which we are bound to execute, and not any "higher law," manufactured for each special occasion out of our own private feelings and opinions. If it be wrong, the government has a department whose duty it is to amend it, and the responsibility is not in any wise thrown upon the judiciary. The inferior tribunals follow our decisions, and the people conform to them because they take it for granted that what we have said once we will say again. There being no superior power to define the law for us as we define it for others, we ought to be a law unto ourselves. If we are not, we are without a standard altogether. The uncertainty of the law — an uncertainty inseparable from the nature of the science — is a great evil at best and we would aggravate it terribly if we could be blown about by every wind of doctrine, holding for true today what we repudiate as false tomorrow.

Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. A palpable mistake, violating justice, reason, and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention, that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Tempora mutantur.* We change with the change of the times, as necessarily as we move with the motion of the earth. But in ordinary cases, to set up our mere notions above the principles which the country has been acting upon as settled and established, is to make ourselves not the ministers and agents of the law, but the masters of the law and the tyrants of the people.

PRATT v. BROWN, SUPREME COURT OF WISCONSIN, 1854 (3 Wis. 603).

Smith, J.: These and kindred propositions were presented to the Supreme Court under its former organization, in the case of *Stevens* v. *Marshall*, 3 Chand. 222, and that case is strongly urged upon us to induce us to concur therein; for it cannot be denied that a majority of the court did hold in conformity with the propositions here insisted upon. As, however, these are questions affecting not merely the routine of practice, nor rights determined by the lapse of time, or palpable legislative enactment, we do not feel at liberty

as we would wish, to throw ourselves back upon that decision, and thus evade further responsibility. It is true that when a principle of law, doubtful in its character, or uncertain in the subject-matter of its application, has been settled by a series of judicial decisions, and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, courts will hesitate long before they will attempt to overturn the result so long established. So when it is apparently indifferent, which of two or more rules is adopted, which one shall have been adopted by judicial sanction, it will be adhered to, although it may not, at the moment, appear to be the preferable rule. But when a question arises involving important private or public rights, extending through all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule *stare decisis*, but at the same time, we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error, and the advantages of review.

We therefore enter upon the discussion of the questions involved in this case, not for the purpose of again reopening the subject-matter thereof to criticism or investigation, but for the purpose of discharging our full duty in the premises.

ETTING v. BANK OF THE UNITED STATES, SUPREME COURT OF THE UNITED STATES, 1826 (11 Wheat. 59).

Marshall, C. J.: In the very elaborate arguments which have been made at the bar, several cases have been cited which have been attentively considered. No attempt will be made to analyze them or to decide on their application to the case before us, because the judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it. Judgment affirmed.

WEAVER v. GARDNER, SUPREME COURT OF KANSAS, 1875 (14 Kan. 347).

Brewer, J.: This is not an open question in this court. As long ago as the case of *George* v. *Hatton*, 2 Kas. 333, it was decided

that in an action like this no indorsement was required on the summons, it not being an action for the recovery of money only, but that if an amount was indorsed, it was not error to take judgment for that amount together with a decree for the sale of the land. Counsel contends that the decision in that case properly rests on other grounds, and that the comments of Chief Justice Crozier upon this question are mere *obiter dicta*. We do not so understand it. It was made one of the points announced in the syllabus, and the decision may as fairly be said to rest upon this as upon any other ground. We are aware of contrary rulings in Ohio: *Williams* v. *Hamlin*, 1 Handy, 95; 1 Nash's Pl. & Prac., 4th ed., p. 67. And if this was an open question we might be disposed to give considerable weight to these authorities. But being merely a question of practice, and having been once settled in this state, we deem it better to adhere to that ruling. Doubtless it has been accepted by the profession during the last ten years as the correct interpretation of the statute, and many rights founded upon it. *Stare decisis* is eminently appropriate in such cases.

AUD v. MAGRUDER, SUPREME COURT OF CALIFORNIA, 1858 (10 Cal. 282.)

Baldwin, J.: In overruling the case of *Bryan* v. *Berry*, we feel less reluctance, because we think that the principle there laid down is of injurious import. We think that principles of commercial law, long established and maintained by a consistent course of decision in the other states, should not be disturbed; that the tendency of such disturbance, in any instance, is to confusion and uncertainty, and gives rise to perplexing litigation, and doubts and uneasiness in the public mind. Almost any general rule governing commercial transactions, if it have been long and consistently upheld as a part of the general system, is better than a rule superseding it, though the latter were much better as an original proposition. Men knowing how the law has been generally received and repeatedly adjudged, govern themselves and are advised by their counsel accordingly; but if Courts establish new rules whenever they are dissatisfied with the reasons upon which the old ones rest, the standards of commercial transactions would be destroyed, and commercial business regulated by a mere guess at what the opinion of judges for the time might be, and not by a knowledge of what the doctrines of recognized works of authority and the precedents of the Courts are. The commercial law has a system of its

own, built up by centuries and the wisdom of learned jurists all over the world. It is not local, but applicable to all the states, with few modifications; and California, eminently commercial in its character, and in close commercial connection with the other states, finds her interests and safety in adhering to the well-settled general rules which prevail in those states as the laws of trade. We repeat, the stability and certainty of these rules are of more importance than any fancied benefits which might accrue from any innovation upon the system. Innovation begets innovation, and we can not always see with clearness what is to be the consequence of the new rule established. This case itself is a good illustration; for, if the doctrine be carried to its logical consequences, and whenever it appears on the face of a security for money, a party is a surety, he is entitled to be held as a guarantor, what becomes of undertakings, acceptances for accommodation, etc.? For, in the latter cases, why might not parol evidence be admitted to show that the party was only accommodation acceptor, in a contest between the original parties, as to show the same fact, as is frequently done, when suit is brought to recover money of the principal which the acceptor has paid on the acceptance? And so, where the party does not sign as surety, but really is such?

The doctrine of *stare decisis*, seriously invoked by the respondent's counsel, can have no effect; or, if any, only the effect to induce us the more readily to return to a principle recognized, we believe, for many years everywhere else in the commercial world. The conservative doctrine of *stare decisis* was never designed to protect such an innovation.

Judgment reversed, and cause remanded.

LINDSAY v. LINDSAY, SUPREME COURT OF INDIANA, 1874 (47 Ind. 283).

Osborn, J.: We are requested to grant a rehearing in this case, that the cases of *Leard* v. *Leard*, 30 Ind. 171, *Nebeker* v. *Rhoads*, 30 Ind. 330, and *DeMoss* v. *Newton*, 31 Ind. 219, may be reconsidered and overruled.

Langdon v. *Applegate*, 5 Ind. 327, was decided at the November term, 1854. It was followed and adhered to by many decisions, and, without legislation, rights of property would have been disturbed by overruling it. The rule established by those cases was regarded as fixed and settled, and so continued until the decision in the case of *The Greencastle etc., Turnpike Co.* v. *The State, ex rel.*

Malot, 28 Ind. 382, at the November term, 1867, when the rule was changed, and *Langdon* v. *Applegate*, and all the cases following it were overruled. It is quite likely that the legislature had knowledge before that opinion was delivered, that *Langdon* v. *Applegate* would be overruled, and for the purpose of averting the consequences, which would otherwise result from such a ruling, passed the act of March 9th, 1867. The object of the legislature clearly appears on the face of the act. The constitutionality of that act was deliberately sustained in *Leard* v. *Leard*, 30 Ind. 171, which was followed by *Nebeker* v. *Rhoads*, 30 Ind. 330, and *DeMoss* v. *Newton*, 31 Ind. 219. It was cited and recognized as authority in *Pierce* v. *Pierce*, 46 Ind. 86.

If we doubted the correctness of the decisions cited, we should be unwilling to overrule them. They have become a rule of property in this state, and to overrule them would disturb titles to real estate, acquired by purchase on the faith of, and in reliance upon, the rule thus established. We should be unwilling to make a decision involving such consequences, except for very convincing reasons. Blackstone lays it down as an established rule, to abide by former precedents, when the same point comes again into controversy, unless flatly absurd. 1 Bl. Com. 70, 71.

Public confidence in the decisions of courts rests in a great measure in their adherence to decided cases. Chancellor Kent, in his Commentaries, 1 Kent, 476, says:

"The community have a right to regard it" (a decision of the court) "as a just declaration or exposition of the law, and to regulate their actions and contracts by it. . . .

"If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a state of perplexing uncertainty as to the law."

To the same effect are *Bellows* v. *Parsons*, 13 N. H. 256; *Taylor* v. *French*, 19 Vt. 49; *Boon* v. *Bowers*, 30 Miss. 246; *Emerson* v. *Atwater*, 7 Mich. 12; *Goodell* v. *Jackson*, 20 Johns. 693, 722; *Day* v. *Munson*, 14 Ohio St. 488; *Loeb* v. *Mathis*, 37 Ind. 306, 312; *Harrow* v. *Myers*, 29 Ind. 469; *Carver* v. *Louthain*, 38 Ind. 530, 538; *Tinder* v. *The Duck Pond Ditching Association*, 38 Ind. 555; *Stanford* v. *Stanford*,

42 Ind. 485, 489; *Grubbs* v. *The State*, 24 Ind. 295, and numerous other cases.

In the case last cited, it is said on page 296: "This principle has so often received the sanction of appellate courts, that it has become a maxim for their guidance, and it is especially important that it should not be forgotten here, where the judges hold for short terms, and where, unfortunately, the entire court may be changed at once."

We might not be willing to go to the extent of some of the authorities cited. We do mean to hold, however, that when a court of appeals of the last resort has, by its decisions, established a rule of property under which rights have been acquired as in this case, an adherence to such decisions by the same court becomes a duty, except for the most convincing and overwhelming reasons.

MALAN v. SIMPSON, SUPREME COURT OF NEW YORK, 1861 (20 How. Pr. 488).

Barnard, Justice.: The question presented for consideration is, whether a term fee of ten dollars can be taxed for every term that a motion for a new trial of a case is on the special term calendar and not necessarily reached or postponed.

In the case of the Mechanics' Banking Association (10 How. 400) the general term of the superior court decided the question in the affirmative, and even went to the length of holding that a trial fee was taxable.

In the case of *Moore* agt. *Cockroft*, 9 How. 479, the general term of the supreme court (second district) also decided the question in the affirmative, but held that a trial fee could not be taxed. These two cases agree in holding that term fees are taxable. There are, in addition, numerous special term decisions holding the same doctrine. It is insisted on the part of the defendants' counsel, that the case of *Jackett* agt. *Judd*, (18 How. 388) has overruled all previous decisions on this question, including the above two general term decisions. That case, it is true, is a decision directly adverse to the taxation of the term fees in question. It is, however, a mistake to suppose that the last decision on the point overruled all prior decisions.

A special term decision cannot even overrule a prior special term decision, much less a general term decision. When there are several conflicting special term decisions, the point is left in doubt; but the moment a point is decided by a general term, the

doubt is removed, until a subsequent conflicting decision of another general term brings it back again. As the judiciary is at present formed, all the judges are co-ordinate in power, and the decision of one single judge in one district in no way binds another in any of the other districts (excepting in adjudicating on the same case) so likewise the general terms are all co-ordinate and the decision of one general term, in one district, is not binding on another general term in any of the other districts, with the single exception above mentioned. The decision of a general term, however, is binding on all the single judges, and all special terms, until some other general term makes a conflicting decision, when the question is, in truth, left undecided by the superior tribunal.

It also results that a decision of the general term of one of the judicial districts, will be binding authority (although an opposite decision may be made by the general term in each of the other districts) in that district, until the court of appeals overrule it, or the same general term by explanation in some subsequent cause in effect overrules it.

It therefore follows, that where there are conflicting decisions on a point by the general term in two districts, the law on that point will be one way in one of those two districts, and directly the opposite in the other; whilst in the rest of the state, it would be left to the decision of the particular judge before whom the question might arise.

Consequently, the question presented in this case having been directly adjudicated upon, and decided in the affirmative by a general term of the supreme court held in the second district, and no general term having made any conflicting decision, the decision of this case must follow the case of *Moore* agt. *Cockroft* (9 How. 479).

The above remarks as to the effect of decisions, will, of course, be understood as referring to their obligatory force; all judges and courts will at all times pay due respect and attentively examine any decisions that may have been made by their brethren or other courts, and give to them such weight as they are justly entitled to. Motion denied with costs.

To understand this opinion, it must be remembered that at that time the "general term" of the Supreme Court in each district was a reviewing court, having appellate jurisdiction over the orders and judgments of the "special term," which was the tribunal of original jurisdiction.

WELLS v. OREGON R. & N. CO., UNITED STATES CIRCUIT COURT, District of Oregon, 1883 (15 Fed. Rep. 561).

Deady, J.: Substantially the same conclusion had been reached by several other judges in the United States circuit courts in the same and similar cases reported in 2 Fed. Rep. 465; 3 Fed. Rep. 593; *Id.* 775; 4 Fed. Rep. 481; 6 Fed. Rep. 426; 8 Fed. Rep. 799.

The only case cited from the decisions of the federal courts to the contrary of these is *Chamblos* v. *Pa., etc., Ry. Co.* 4 Brewst. 563, in which a preliminary injunction was refused by Judge McKennan in a similar case; and also the case of *New England Exp. Co.* v. *Maine, etc., Ry. Co.* 57 Me. 194, and *Sergeant* v. *Boston, etc. Ry. Co.* 115 Mass. 416, in which the right of an express company to what are known as express facilities on the defendants' roads was denied. But the very decided weight and number of these authorities recognize the existence of the express business and the right of those engaged in it to have the proper facilities therefor allowed them by the defendants, and to secure the same by injunction in case they are refused. Until this question is settled by the supreme court, these deliberate decisions of co-ordinate tribunals, like the circuit courts, ought, except in an extreme case, to furnish a guide for the decision of this court. This is the rule that has been followed by justices of the supreme court on the circuit (*Washburn* v. *Gould*, 3 Story, 133; *Brooks* v. *Bicknell*, 3 McLean, 250; *American, etc., Co.* v. *Fiber, etc., Co.*, 3 Fisher, 363) and in *Goodyear, etc., Co.* v. *Milles*, 7 O. G. 40, Judge Emmons examines the question at some length, and concludes that "if one system of co-ordinate courts more than another calls for the application of these general principles, it is that of the circuit courts of the United States. . . . Although divided in jurisdiction, geographically, they constitute a single system, and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand that it should be followed until modified by the appellate court."

In *Edison Electric Light Co.* v. *Bloomingdale*, 65 Fed. Rep. 212 (1894), Lacombe J., says:

It is, of course, the duty of the several circuit courts in the second circuit, comity to the contrary notwithstanding, to follow the decisions of the court of appeals of that circuit rather than those of a circuit court in some other circuit.

BURT v. POWIS, SUPREME COURT OF NEW YORK, 1858 (16 How. Pr. 289).

By the court — E. Darwin Smith, Justice. The questions arising upon this appeal are precisely the same presented to the court

in the case of *Walker* agt. *Crane* (17 Barb. 119). In that case the construction, force and validity of the act of March 16, 1852, entitled, "An act to facilitate the dissolution of manufacturing corporations in the county of Herkimer, and to secure the payment of their debts without preferences," was elaborately discussed and fully considered.

The able opinion of Judge Gridley in the case, appears to have been concurred in by the four judges of the fifth district, all present at the general term. By chapter 64 of acts of the sessions of 1855, page 65, the provisions of the aforesaid act are applied to the Seneca County Woolen Mills, which brings this case necessarily within the decision in the case of *Walker* agt. *Crane*, and also within the case of *The Herkimer County Bank* agt. *Furman* (17 Barb. 116). Those decisions, both pronounced at the same general term, are authoritative decisions of this court upon the questions presented, and binding as such upon the judges of this court and upon referees, and all other subordinate tribunals, until overruled or reversed. The report of the referee in this action being in distinct conflict with such decision, the judgment entered thereupon must, of course, be reversed.

The referee had no right to disregard the decision of the court upon the express point before him. If there was error in that decision, the court itself at any general term might reconsider and overrule the same. Otherwise, and until that had been done, it was the law of this court binding as authority in all places, until reversed by the court of appeals. The fact that the referee in this case supposed himself at liberty avowedly to render a judgment in open conflict with a decision of the court at general term, and that learned counsel with the above cases before them, should have called upon the referee to do so, seems to imply the prevalence to some extent of a fundamental error in respect to this court, in the assumption that the law is, or may be different in the different districts of the state. Perhaps some conflict of decision may have given rise to such an impression, and induced counsel to suppose that it was admissible to experiment upon the possibility of obtaining a different decision in one district from the decision of another. But I do not think this court in any of its branches deserves the reproach of countenancing any such experiments. Upon questions of law, the conflict of opinions between the decisions of the judges in the several districts of the state, is quite infrequent.

PARKER v. POMEROY, SUPREME COURT OF WISCONSIN, 1853 (2 Wis. 112).

By the Court, Crawford, J. The important question presented by the record in this case, and the only one upon which an error might be predicated, is whether a defendant in replevin, in whose favor a judgment for the value of the goods replevied, and damages for detention, with costs, has been rendered in the Circuit Court, is entitled to a *capias ad satisfaciendum* against the plaintiff to enforce his judgment.

We regret that this question is not open in the present case; and so far as this case is concerned, we cannot discuss it. At the December Term, 1851, of the Supreme Court, it was determined that the pleas of justification interposed by the defendants were bad, because a *ca. sa.* could not issue on a judgment in favor of the defendant in replevin, as above stated. The case was remanded, and after a trial in the Circuit Court, it is now before us on writ of error.

However we might differ with the conclusion of the Supreme Court, as contained in the opinion given, still it must be esteemed, for all the purposes of the present case, *res adjudicata.* (*Vide* The *Washington Bridge Co.* v. *Stewart and others*, 3 Howard, 413.)

As we discover no other error in the case, we are, with reluctance, compelled to affirm the judgment of the Circuit Court.

In *Caldwell* v. *Gale*, 11 Mich. 77 (1862), the court says:

The first proposition is sustained by adjudged cases both in England and in this country. It appears to have had its origin as a rule of law in Penruddock's Case, 5 Coke, 100. It has antiquity on its side, and is, therefore, entitled to all the consideration and weight that time can give to an adjudication, as precedent for other courts to follow. We are not, however, aware that the question has ever before arisen in our courts, and we do not feel ourselves bound to follow, as precedents, adjudications outside of our own State — save adjudications in the Federal Courts on questions arising under the Constitution and laws of the Federal Government — any further than they appear to us to be warranted by the fundamental principles of the common law.

LEBANON BANK v. MANGAN, SUPREME COURT OF PENNSYLVANIA, 1857 (27 Pa. St. 452).

Lewis, C. J.: The decision of the Supreme Court of the United States in *Miller* v. *Austin*, 13 How. 218, is certainly entitled to very great respect, on account of the learning and ability of the judges who administer the law in that court. But this question does not arise upon the construction of the constitution or laws of the

United States; the case before that court was a certificate of deposit issued by a bank in Mississippi, and endorsed in Ohio. The action was brought in the latter state, not upon the certificate, but upon the endorsement. Every endorsement is treated as a new and substantive contract, and is governed by the law of the place where the endorsement is made: *Slocum* v. *Pomroy*, 6 Cranch. 221; Story Confl. Laws, 314. The Federal tribunal had, therefore, no other duty to perform than to ascertain what was the law of Ohio; and its decision is nothing more than the expression of its opinion that, under the law of Ohio, the endorser was liable. Conceding this to be a correct exposition of the law of Ohio, it furnishes no reason whatever for a change in the settled laws and usages of this state. If each state is constantly changing its rules of decision for the purpose of conforming to those of its sister states, it might happen that by the time we had accommodated ourselves to the law of Ohio, that state, influenced by the like comity, might have adopted our rule, and thus the law would be rendered uncertain in both states. But it is remarkable that a decision of the Supreme Court of Ohio, in exact conformity with the Pennsylvania decisions, was cited in the argument, and the learned judge who delivered the opinion of the Federal Court did not undertake to show that the citation was erroneous, or that the decision had been overruled by the proper tribunal of Ohio. It is, therefore, by no means certain that the case of *Miller* v. *Austin* is even a correct declaration of the law of Ohio. It is very certain, however, that it is no authority on this question, in opposition to the decisions of the Supreme Court of Pennsylvania.

The same remark may be made in relation to the decisions of other states on this question. When a principle of Pennsylvania law has been settled by the Supreme Court of the state, it is not to be changed in order to conform to the laws of other states. Judgment affirmed.

SHELTON v. HAMILTON, SUPREME COURT OF MISSISSIPPI, 1852 (23 Miss. 496).

Yerger, J.: The case of *Erwin* v. *Dundas*, 4 How. 58, decided by the Supreme Court of the United States, has been pressed upon our consideration. That case went up from Alabama, and the Supreme Court held that a sale of lands made in Alabama, by virtue of an execution tested after the death of the defendant without revivor, was absolutely void, and not merely voidable. While we

entertain a proper respect for the opinions of the Supreme Court, and are willing to yield to them the deference which is due to so distinguished a tribunal, yet when its decisions come in conflict with those of this court, in relation to questions over which the jurisdiction of this court is ample and its decisions final, we feel bound to adhere to our own decisions. Any other rule would subject the opinions of this court to a degree of fluctuation and change greatly to be deplored. Retrospective legislation has always been deemed unjust and oppressive. Whenever courts of justice alter or change the rules of law they have once established, and on the faith of which contracts have been made or rights acquired, many of the most injurious effects of retrospective legislation will result from such action. Entertaining this opinion, whatever views we might have been inclined to take of the question presented in the charge of the circuit judge, if it had been one of the first impression, we shall adhere to the rule laid down by this court in the case of *Smith* v. *Winston*, before referred to.

SIM'S CASE, SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1851 (7 Cush. 285).

The question was as to the constitutionality of an act of Congress of 1850. The act was substantially the same as an act of Congress of 1793 which had been held constitutional by the federal courts.

Shaw, C. J.: Since the argument in court, this morning, I am reminded by one of the counsel for the petitioner, that the law in question ought to be regarded as unconstitutional, because it makes no provision for a trial by jury. We think that this cannot vary the result. The law of 1850 stands, in this respect, precisely on the same ground with that of 1793, and the same grounds of argument which tend to show the unconstitutionality of one apply with equal force to the other; and the same answer must be made to them.

The principle of adhering to judicial precedent, especially that of the supreme court of the United States, in a case depending upon the constitution and laws of the United States, and thus placed within their special and final jurisdiction, is absolutely necessary to the peace, union and harmonious action of the state and general governments. The preservation of both, with their full and entire powers, each in its proper sphere, was regarded by the framers of the constitution, and has ever since been regarded, as essential to the peace, order and prosperity of all the United States.

If this were a new question, now for the first time presented, we should desire to pause and take time for consideration. But though this act, the construction of which is now drawn in question, is recent, and this point, in the form in which it is now stated, is new, yet the solution of the question depends upon reasons and judicial decisions, upon legal principles and a long course of practice, which are familiar, and which have often been the subject of discussion and deliberation.

Considering, therefore, the nature of the subject, the urgent necessity for a speedy and prompt decision, we have not thought it expedient to delay the judgment. I have, therefore, to state, in behalf of the court, under the weighty responsibility which rests upon us, and as the unanimous opinion of the court, that the writ of *habeas corpus* prayed for cannot be granted. Writ refused.

SMOOT v. LAFFERTY, SUPREME COURT OF ILLINOIS, 1845 (2 Gilm. 383).

Caton, J.: The declaration in this cause states that the defendant below was sheriff of the county of Gallatin, and as such sheriff, had in his hands a certain execution and fee bills against the plaintiff below, by virtue of which he levied upon a certain ferry boat, the property of the said plaintiff, and sold it without having the same appraised by three disinterested householders, as required by the provisions of the act of January 6th, 1843, entitled, "An act regulating the sales of property on judgments and executions." The declaration contains sufficient averments to show that the case was embraced within the provisions of that act. To this declaration the defendant filed a demurrer, which was overruled by the court and judgment given for the plaintiff, which is now assigned for error.

The only question presented for our consideration is the constitutionality of that law. The Supreme Court of the United States, in the case of *McCracken* v. *Hayward*, decided at the January term, 1844, have distinctly decided that the act of 1841 is an express violation of the constitution of the United States and void. The provisions of the act first mentioned are substantially the same as those of this act. As by the constitution of the United States that court has ultimate exclusive jurisdiction of that question, we are bound by its decision.

The judgment of the circuit court is reversed with costs.

HICKS v. HOTCHKISS, COURT OF CHANCERY OF NEW YORK, 1823 (7 Johns. Ch. 297).

Kent, Chancellor: The decisions of the Supreme Court of the United States upon questions arising upon the construction of the powers and authority of the Constitution must be definitive and binding upon all the tribunals of the Union, because the Constitution has made their judgments and decrees final and without appeal. Every decision by a court in the last resort, in a case within its undoubted jurisdiction, must, from the necessity of the case, be absolutely binding. The proposition that the state courts are equally supreme, independent and absolute in the consideration and decision of such national questions strikes me as untenable. It would lead to the subversion of all order and subordination. There must be a paramount power somewhere in the organization of every political institution, or there is no government. The Supreme Court of the United States, on questions within its cognizance, is that power; and if the state courts were to undertake to disobey or elude its decisions, the consequence would be discord and confusion, or a dissolution of the national compact.

I should have deemed it my duty, therefore, to have maintained this doctrine, even if I had considered the application of a prohibition in the Constitution to the discharge under the act of 1811, to have been a mistaken application.

WILKINS v. PHILIPS, SUPREME COURT OF OHIO, 1827 (3 Ohio, 49).

By the Court: The case of *Marstiller and others* v. *McLean*, 7 Wheat. 156, was decided upon the authority of the case of *Perry and others* v. *Jackson and others*, 4 Term, 516. In this latter case, Lord Kenyon asserts that it is the first time the question had been brought up for decision whether, where the saving clause of the statute of limitations protected only a part of those joined in the action, all the plaintiffs could claim its protection. It decided against the protection, but upon grounds by no means satisfactory to us. The case was one of partnership, which, we think, was sufficient of itself, to have warranted the decision made. This is in part relied upon, and the decision is, in part, put upon the ground of the grammatical construction of the statute. The Supreme Court of the United States ground themselves upon this authority. Highly as we respect the opinions of this tribunal, we can not adopt them in construction of our own statutes, where they are at variance with our own judgments. We consider the reasoning of the courts of

Connecticut and Kentucky, cited by the other side, as more consonant to the general advancement of justice. It is our opinion, that, if any one of the parties who sue a writ of error is within the proviso that takes the case out of the statute of limitations, the case is saved for all the parties. The demurrer to the replication is overruled, and cause remanded for further proceedings.

COHENS v. VIRGINIA, SUPREME COURT OF THE UNITED STATES, 1821 (6 Wheat. 265).

Marshall, C. J.: The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of *Marbury* v. *Madison*.

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

In the case of *Marbury* v. *Madison*, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for Marbury had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says, that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and, in this case (in

the case of *Marbury* v. *Madison*), a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it."

The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative, or exclusive sense, is to be so used as to defeat some of the great objects of the article.

To this construction the court cannot give its assent. The general expressions in the case of *Marbury* v. *Madison* must be understood with the limitations which are given to them in this opinion; limitations, which in no degree affect the decision in that case, or the tenor of its reasoning.

FLORIDA C. R. CO. v. SCHUTTE, SUPREME COURT OF THE UNITED STATES, 1881 (103 U. S. 118).

Waite, C. J.: As to the first question, we deem it sufficient to say that the Supreme Court of Florida has distinctly decided that in the case of this Company, as well as the other, the statutory authority was complete. The point was directly made by the pleadings and as directly passed on by the court. Although the bill in the case was finally dismissed because it was not proved that any of the state bonds had been sold, the decision was in no just sense *dictum*. It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in

the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much part of the judgment of the court as was that on any other of the several matters on which the case as a whole depended.

In CROSS V. BURKE 146 U. S. 82 (1892), Fuller, C. J., says:

It was to this act that Mr. Justice Miller referred in *Wales* v. *Whitney*, 114 U. S., 564, 565, as restoring "the appellate jurisdiction of this court in *habeas corpus* cases from decisions of the circuit courts and that this necessarily included jurisdiction over similar judgments of the Supreme Court of the District of Columbia." But the question of jurisdiction does not appear to have been contested in *Wales* v. *Whitney*, and where this is so, the court does not consider itself bound by the view expressed.

TRINITY COUNTY V. MCCAMMON, SUPREME COURT OF CALIFORNIA, 1864 (25 Cal. 117).

By the Court, Shafter, J., on petition for modification of opinion:

Since the decision of the appeal taken in this action, a petition has been presented on the part of the appellant, asking not for a rehearing, nor for any modification of the judgment, but for a modification of the opinion, on the ground that the opinion is to some extent *obiter;* and on the further ground that the Court has misapprehended the contents of the report made by the committee appointed by the County Judge to pass on the value of the building owned by Edgcomb, and which he proposed to sell to the county.

In so far as the opinion passes upon any question not necessary to the decision of the appeal, it will interpose no obstacle to a reinvestigation of such question upon its merits in any case that may hereafter come to this Court in which the point shall be directly presented. In so far as the misapprehension of the contents of the committee's report is concerned, the document as such, was not in the transcript, and we were therefore justified in assuming that it had no contents, *aliunde* the contents set out in the proceedings. Any case coming here hereafter showing that the report comprehended topics other than those to which the present record confines it, will be a case, to that extent, different from the present, and of course one to which the opinion in this case cannot be considered as having any just application. Petition denied.

STOW V. PEOPLE, SUPREME COURT OF ILLINOIS, 1850 (25 Ill. 81).

Mr. Chief Justice Caton delivered the opinion of the court:

The first question we propose to consider, is that of the jurisdiction of the court before which the prisoner was convicted. This question we shall determine solely upon the construction of the proviso of the first section of the fifth article of the Constitution, without particular reference to the different acts of the legislature, by which it is supposed that the court has been deprived of jurisdiction.

That proviso is this: "Provided, that inferior local courts of civil and criminal jurisdiction may be established, by the general assemblies, in the cities of this State, but such courts shall have a uniform organization and jurisdiction in such cities." We were first called upon to consider this provision of the Constitution, in reference to this very court, in the case of *Perry* v. *The People*, 14 Ill. 496. The objection, and the only objection then raised to the court, was, that the legislature had established one court in one city of the State only; whereas it was, by this clause of the Constitution, required, when it attempted to exercise the power here conferred, to legislate for all the cities alike, and establish the same court, or courts, in each of the cities within the limits of the State. It was objected, and only objected, as this had not been done, and but one city had been provided with a court, that it was not authorized by the Constitution. This, we say, was the only question presented by the record, and the only one the court was called upon to decide. That was decided by the court, and it was held that the legislature might establish courts in such cities alone, as the public exigencies in its judgment might require.

It is true that the court, in its opinion, went beyond the case before it, and, in anticipation of the future, made an admonitory remark, which contains an intimation, that all the courts in all the cities, which should be established, must have a uniform organization and jurisdiction. It is this: "The 'uniformity of organization and jurisdiction' has respect to the courts and not to the cities as its antecedent. As these courts may be extended, care will be taken to introduce into other cities one of a 'uniform character of organization and jurisdiction'; as the power is restricted and confined to such character as shall produce uniformity in the mode of organization and extent of jurisdiction." The remark was undoubtedly true and pertinent, that the uniformity of organization and jurisdiction, has respect to the courts and not to the cities; but

it was not necessary to say how far that uniformity was required to extend. It was sufficient that the uniformity enjoined did not refer to cities, and that the general assembly might legislate for one city and not for another. . . .

HOLCOMB v. BONNELL, SUPREME COURT OF MICHIGAN, 1875 (32 Mich. 6).

Graves, C. J.: On the trial before a jury the evidence tended to establish a right in Holcomb to recover, but the defence contended that all right of action on the bond was excluded on the ground that the plaintiff had never got into actual possession under the judgment, and cited *Delashman* v. *Berry*, 21 Mich., 516, as decisive on the subject; and the circuit judge, taking the same view of that case, felt constrained to yield to this position of defendants, and he accordingly instructed the jury to find against Holcomb.

Without questioning in the least the correctness of the decision itself in *Delashman* v. *Berry*, we do not fail to observe that the language is pretty broad and open to an application much more extended than was designed, unless strictly confined to the state of facts there shown. It is hardly necessary to observe that the language used in deciding cases can rarely be separated from the specific matters contemplated by the court, without leading to results completely at variance with the principle with which the expressions were meant to harmonize. In laying down propositions which appear correct in view of the actual case as shaped by the record, it is not generally considered needful to write down in guarded terms the particular limitations of the propositions, or the conditions which would not be suited to them. It is supposed they will be read not as abstractions, but as propositions inseparably bound up with the particular issue and matters the court is then dealing with, and it is in this way that the observations in the case mentioned must be considered, and without yielding to them any further than the needs of that case required. Now, in *Delashman* v. *Berry* the plaintiff had got judgment of restitution merely, and so far as appeared, there was no impediment to hinder him from getting actual possession pursuant to the judgment. Nevertheless, without presenting any reason whatever for failing to get, or even for omitting all effort to get possession, he at once sued on the bond, and the court thought he did not, upon a just view of the statute, show a right of action. There was no pretense that his opponent by dilatory means had obstructed his right under the judgment,

and had effectually prevented his getting into possession in compliance with it, until his estate had come to an end by effluxion of time.

In the present case the defendant Bonnell appealed against Holcomb's recovery before the commissioner, and in order to effectuate the appeal and keep Holcomb out, she gave this bond to secure rent; and the circuit court, whilst Holcomb's term was still running, and when it had about two-thirds of a year to continue, also gave judgment on the appeal for him, and adjudged his right to possession, and that he was entitled to process to be put in, and she then delayed his remedy of restitution until his term was about expired; and she now resists a recovery on the bond for the reason that he did not do the very thing which the giving of the bond enabled her to prevent his doing, and which she did prevent his doing.

Having by means of the bond placed herself in a position which enabled her to delay Holcomb in getting possession, which the judgment determined he was entitled to, until his right to go in was substantially terminated by the expiration of his term, and having in fact so delayed him, she now insists that under the statute as explained in *Delashman* v. *Berry*, Holcomb is cut off from all remedy on the bond for the very reason that he did not obtain actual possession under his judgment.

I think this position cannot be sustained. The legislature could never have intended to require a bond as a condition of appeal, and at the same time have intended that it should be worthless if the appellant after judgment for possession in the appellate court should by mere dilatory action then delay actual restitution to the plaintiff until made impossible as a consequence of the expiration of his term. Any such view would lead to absurdity and gross injustice. It would afford a bounty to trickery. When the plaintiff recovered on the appeal in the circuit court and the defendant refrained from carrying the case further, the former was absolutely entitled to restitution and all that remained to be done to give him restitution was absolutely due to him.

No lawful right existed anywhere to deny him. He had done all that was practicable for him to do, and was not at fault in any way. He submitted, as he was compelled to submit, so far as the record shows, to the stay obtained by defendant Bonnell, and which without the bond she could not have been in a position to obtain, and she should not be allowed to defeat the bond by setting up his failure to do what she thus made it impossible for him to do.

I think the judgment should be reversed, with costs, and a new trial ordered.

Campbell, and Cooley, JJ., concurred.

BOOKS OF AUTHORITY

KENT, COMMENTARIES, I, 499.

The reports of adjudged cases are admitted to contain the highest and most authentic evidence of the principles and rules of the common law; but there are numerous other works of sages in the profession which contribute very essentially to facilitate the researches and abridge the labor of the student. These works acquire by time, and their intrinsic value, the weight of authority; and the earlier text-books are cited and relied upon as such, in the discussions at the bar and upon the bench, in cases where judicial authority is wanting.

One of the oldest of these treatises is Glanville's *Tractatus de Legibus Angliae*, composed in the reign of Henry II., in which he was chief justiciary, and presided in the *aula regis*. It is a plain, dry, perspicuous essay on the ancient actions and the forms of writs then in use. It has become almost obsolete and useless for any practical purpose, owing to the disuse of the ancient actions; but it is a curious monument of the improved state of the Norman administration of justice. It is peculiarly venerable, if it be, as it is said, the most ancient book extant upon the laws and customs of England. It has been cited, and commented upon, and extolled, by Lord Coke, Sir Matthew Hale, Sir Henry Spelman, Selden, Blackstone, and most of the eminent lawyers and antiquaries of the two last centuries. Mr. Reeves says that he incorporated the whole of Glanville into his History of the English Law.

Bracton wrote his treatise, *De Legibus et Consuetudinibus Angliae*, in the reign of Henry III., and he is said to have been a judge itinerant in that reign, and professor of law at Oxford.[1] He is a

[1] The latter portion of this statement is incorrect. "The author, Henry de Bratton (from a village of Bratton, in Devonshire) was a clergyman and royal judge under Henry III (1216–1272). We meet him first in 1245 as itinerant justice, from 1248 to 1267 as assize judge in the southwestern counties of England. His permanent office was that of royal judge in the *placita coram ipso rege* (*quæ sequuntur regem*), *i.e.*, the old *curia regis* proper. He never sat in the *bancum regis* at Westminster. He died in 1268. His name, the incorrect spelling of which he cited as an illustration of the invalidity of a writ, was frequently misspelled

classical writer, and has been called, by a perfect judge of his merits, the father of the English law, and the great ornament of the age in which he lived. His work is a systematic performance, giving a complete view of the law in all its titles, as it stood at the time it was written; and it is filled with copious and accurate details of legal learning. It treats of the several ways of acquiring, maintaining, and recovering property, much in the manner of the *Institutes* of Justinian. The style, clear, expressive, and sometimes polished, has been ascribed to the influence of the civil and canon law, which he had studied and admired; and the work evinces, by the freedom of the quotations, that he had drank deep at those fountains.

In the reign of Edward I., Bracton was reduced into a compendium by Thornton, which shows, says Selden, how great the authority of Bracton was in the time of Edward I. He continued to be the repository of ancient English jurisprudence, and the principal source of legal authority, down to the time of the publication of the *Institutes* of Lord Coke.

Britton and Fleta, two treatises in the reign of Edward I., were nothing more than appendages to Bracton, and from whom they drew largely. Lord Coke says that Britton was Bishop of Hereford[1] and of profound judgment in the common law, and that Fleta was written by some learned lawyer, while in confinement in the Fleet prison. The dissertation which Selden annexed to the edition of Fleta, printed in his time, is evidence of the high estimation in which the work was then held.

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Sir John Fortescue's treatise, *De Laudibus Legum Angliae*, was written in the reign of Henry VI., under whom he was Chief Justice, and afterwards Chancellor. It is in the form of a dialogue between him and the young prince, and he undertakes to show that the common law was the most reasonable and the most ancient in

by copyists. As a consequence, he has come down to posterity as Bracton." Brunner, Sources of English Law, Select Essays in Anglo-American Legal History, II, 7, 35.

[1] This is incorrect. "According to the investigations of its latest editor, it owes its origin to a project (which is historically verifiable) of Edward I to cause a compilation of English law to be made after the manner of the Institutes. The work is not written in the style of a law book, but its propositions are couched in the authoritative language of a lawgiver. . . . The author, Britton, was probably a clerk in the service of the crown." Brunner, Sources of English Law, Select Essays in Anglo-American Legal History, II, 7, 37.

Europe, and superior to the civil law. It displays sentiments of liberty, and a sense of a limited monarchy, remarkable, in the fierce and barbarous period of the Lancastrian civil wars, and an air of probity and piety runs through the work. He insisted, for instance, that the conviction of criminals by juries, and without torture, was much more just and humane than the method of the continental nations; and that the privilege of challenging jurors, and of bringing writs of attaint upon corrupt verdicts, and the usual wealth of jurors, afforded that security to the lives and property of English subjects, which no other country was capable of affording. He run a parallel, in many instances, between the common and the civil law, in order to show the superior equity of the former, and that the proceedings in courts of justice were not so dilatory as in other nations. Though some of the instances of that superiority which he adduces, such as the illegitimacy of ante-nuptial children and the doctrine of feudal wardships, are of no consequence, yet the security arising from trial by jury, and the security of life and property by means of the mixed government of England, and the limitations of the royal prerogative, were solid and pre-eminent marks of superiority.

Littleton's *Book of Tenures* was composed in the reign of Edward IV., and it is confined entirely to the doctrines of the old English law, concerning the tenure of real estates, and the incidents and services relating thereto. In the first book, Littleton treats of the quantity of interest in estates, under the heads of fee-simple, fee-tail, tenant in dower, tenant by the curtesy, tenant for life, for years, and at will. In the second book, he treats of the several tenures and services by which lands were then held, such as homage, fealty, villenage, and knight service. In the third book, he treats of divers subjects relative to estates and their tenures, under the heads of parceners, joint tenants, estates on condition, releases, warranty, &c. He explained the learning of that period on the subject of tenures and estates, with a felicity of arrangement, and perspicuity and precision of style, that placed him above all other writers on the law. No work ever attained a more decided and permanent reputation for accuracy and authority. Lord Coke says, that Littleton's *Tenures* was the most perfect and absolute work, and as free from error as any book that ever was written on any human science; and he is justly indignant at the presumptuous and absurd censures which the celebrated civilian, Hotman, was pleased to bestow on Littleton's clear and accurate view of English feudal tenures. He said

he had known many of his cases drawn in question, but never could find any judgment given against any of them, which could not be affirmed of any other book in our law. The great excellence of Littleton is his full knowledge of the subject, and the neatness and simplicity of his manner. He cites but very few cases, but he holds no opinion, says his great commentator, but what is supported by authority and reason. A great part of Littleton is not now law, or is entirely obsolete with us; and particularly much of the matter in the chapters on estates in fee-tail, copyholds, feudal services, discontinuance, attornment, remitter, confirmation, and warranty. But, even at this day, what remains concerning tenures cannot be well understood without a general knowledge of what is abolished; and even the obsolete part of Littleton can be studied with pleasure and profit by all who are desirous to trace the history and grounds of the law. It has been supposed by Mr. Butler that Littleton's treatise would still be a proper introduction to the institutes of the English law on the subject of real estates.

Perkins's *Treatise of the Laws of England*, written in the reign of Henry VIII., has always been deemed a valuable book for the learning and ingenuity displayed in it relating to the title and conveyance of real property. Coke said it was wittily and learnedly composed; and Lord Mansfield held it to be a good authority in point of law. It treats of grants, deeds, feoffments, exchange, dower, curtesy, devises, surrenders, reservations, and conditions; and it abounds with citations, and supports the positions laid down by references to the Year Books, and Fitzherbert's *Abridgment*.

The *Dialogue between a Doctor of Divinity and a Student in Law* was written by St. Germain, in the reign of Henry VIII., and discusses, in a popular manner, many principles and points of common law. The seventeenth edition of this work was published in 1787, and dedicated to the younger students and professors of law. It has always been considered by the courts, and the best of the juridical writers, as a book of merit and authority.

But the legal productions of the preceding ages were all surpassed in value and extent in the reigns of Elizabeth and James by the results of the splendid talents and immense erudition of Bacon and Coke. The writings of Lord Bacon on the municipal law of England are not to be compared in reputation to his productions in physical and moral science; but it is nevertheless true, that he shed light and learning, and left the impression of profound and original thought, on every subject which he touched. It was the course of

his life to connect law with other studies, and therefore, he admitted that his arguments might have the more variety, and perhaps the greater depth of reason. His principal law tracts are his *Elements of the Common Law*, containing an illustration of the most important maxims of the common law, and of the use of the law in its application to the protection of person, property, and character, and his *Reading upon the Statute of Uses*. Lord Bacon seems to have disdained to cite authorities in his law treatises; and in that respect he approved of the method of Littleton and Fitzherbert, and condemned that of Perkins and Staunforde. He admits, however, that in his own private copy he had all his authorities quoted, and that he did sometimes "weigh down authorities by evidence of reason"; and that he intended rather to correct the law than soothe received error, or endeavor to reconcile contradictions by unprofitable subtlety. He made a proposal to King James for a digest of the whole of the common and statute law of England; and if he had been encouraged and enabled to employ the resources of his great mind on such a noble work, he would have done infinite service to mankind, and have settled in his favor the question, which he said would be made with posterity, whether he or Coke was the greater lawyer. The writings of Lord Bacon are distinguished for the perspicuity and simplicity with which every subject is treated.

Lord Coke's *Institutes* have had a most extensive and permanent influence on the common law of England. The first part is a commentary upon Littleton's *Tenures*; and, notwithstanding the magnitude of the work, it has reached seventeen editions. Many of the doctrines which his writings explain and illustrate have become obsolete, or have been swept away by the current of events. The influence of two centuries must inevitably work a great revolution in the laws and usages, as well as in the manners and taste of a nation. Perhaps everything useful in the *Institutes* of Coke may be found more methodically arranged, and more interestingly taught, in the modern compilations and digests; yet his authority on all subjects connected with the ancient law is too great and too venerable to be neglected. The writings of Coke, as Butler has observed, stand between and connect the ancient and the modern law — the old and new jurisprudence. He explains the ancient system of law as it stood in his day, and he points out the leading circumstances of the innovation which was begun. We have in his works the beginning of the disuse of real actions; the tendency of the nation to abolish the military tenures; the rise

of a system of equity jurisdiction, and the outlines of every point of modern law.

The second part of the *Institutes* of Coke is a commentary upon the ancient statutes, beginning with Magna Charta, and proceeding down to the reign of Henry VIII.; and his commentaries upon the ancient statutes consisted, as he himself declared, of the authentic resolutions of the courts of justice, and were not like the glosses of the civilians upon the text of the civil law, which contain so many diversities of opinion as to increase rather than to resolve doubts and uncertainties. His commentary upon Magna Charta, and particularly on the celebrated 29th chapter, is deeply interesting to the lawyers of the present age, as well from the value and dignity of the text, as the spirit of justice and of civil liberty which pervades and animates the work. In this respect, Lord Coke eclipses his contemporary and great rival, Lord Bacon, who was as inferior to Coke in a just sense and manly vindication of the freedom and privileges of the subject, as he was superior in general science and philosophy. Lord Coke, in a very advanced age, took a principal share in proposing and framing the celebrated Petition of Right, containing a parliamentary sanction of those constitutional limitations upon the royal prerogative which were deemed essential to the liberties of the nation.

The third and fourth parts of the *Institutes* treat of high treason and the other pleas of the crown, and of the history and antiquities of the English courts. The harshness and severity of the ancient criminal code of England are not suited to the taste and moral sense of the present age; and those parts of the *Institutes* are of very inconsiderable value and use, except it be to enlighten the researches of the legal antiquary. In this respect, Coke's *Pleas of the Crown* are inferior to the work under that title by Staunforde, who wrote in the age of Philip and Mary, and was the earliest writer who treated didactically on that subject. Staunforde wrote in law French; but Lord Coke, more wisely and benevolently, wrote in English, because, he said, the matter of which he treated concerned all the subjects of the realm.

Before we quit the period of the old law, we must not omit to notice the grand abridgments of Statham, Fitzherbert, and Brooke. Statham was a baron of the Exchequer, in the time of Edward IV. His abridgment of the law was a digest of most titles of the law, comprising under each head adjudged cases from the Year Books, given in a concise manner. The cases were strung together without

regard to connection of matter. It is doubtful whether it was printed before or after Fitzherbert's work, but the latter entirely superseded it. Fitzherbert was published in the reign of Henry VIII., and came out in 1514, and was for that period, a work of singular learning and utility. Brooke was published in 1573, and in a great degree superseded the others. The two last abridgments contain the substance of the Year Books regularly digested; and by the form and order which they gave to the rude materials before them, and the great facility which they afforded to the acquisition of knowledge, they must have contributed very greatly and rapidly to the improvement of legal science. Even those exceedingly laborious abridgments were in their turn superseded by the abridgments of Rolle and his successors. . . .

The treatise of Sir Henry Finch, being a discourse in four books, on the maxims and positive grounds of the law, was first published in French, in 1613; and we have the authority of Sir William Blackstone for saying, that his method was greatly superior to that in all the treatises that were then extant. His text was weighty, concise, and nervous, and his illustrations apposite, clear and authentic. But the abolition of the feudal tenures, and the disuse of real actions, have rendered half of his work obsolete.

Sheppard's *Touchstone of Common Assurances* was the production of Mr. Justice Dodderidge, in the reign of James I. It is a work of great value and authority, touching the common-law modes of conveyance, and those derived from the Statute of Uses. It treats also copiously of the law of uses and devises; but the great defect of the book is the want of that lucid order and perspicuous method which are essential to the cheerful perusal and ready perception of the merits of such a work. The second volume of *Collectanea Juridica* has an analysis of the theory and practice of conveyancing, which is only a compendious abridgment of the *Touchstone*; and there is a very improved edition of it by Preston, who has favored the profession with several excellent tracts on the law of real property.

Rolle's *Abridgment of the Law* was published soon after the Restoration, with an interesting preface by Sir Matthew Hale. It brings down the law to the end of the reign of Charles I., and though it be an excellent work, and, in point of method, succinctness and legal precision, a model of a good abridgment, Sir Matthew Hale considered it an unequal monument of the fame of Rolle, and that it fell short of what might have been expected from his abilities

and great merit. It is also deemed by Mr. Hargrave a great defect in Viner's very extensive abridgment, that he should have attempted to engraft it on such a narrow substance as Rolle's work. Rolle was Chief Justice of England under the protectorate of Cromwell, and under the preceding commonwealth; but as his abridgment was printed in the reign of Charles II., he has no other title annexed to his name than that of Sergeant Rolle, and his republican dignity was not recognized.

Since the period of the English revolution, the new digests have superseded the use of the former ones; and Bacon, Viner, Comyns, and Cruise contain such a vast accession of modern law learning that their predecessors have fallen into oblivion. Viner's *Abridgment*, with all its defects and inaccuracies, is a convenient part of every lawyer's library. We obtain by it an easy and prompt access to the learning of the Year Books and the old abridgments, and the work is enriched with many reports of adjudged cases not to be found elsewhere; but, after all that can be said in its favor, it is an enormous mass of crude, undigested matter, and not worth the labor of the compilation. The Digest of Lord Chief Baron Comyns is a production of vastly higher order and reputation, and it is the best digest extant upon the entire body of the English law. Lord Kenyon held his opinion alone to be of great authority, for he was considered by his contemporaries as the most able lawyer in Westminster Hall. The title *Pleader* has often been considered as the most elaborate and useful head of the work; but the whole is distinguished for the variety of the matter, its lucid order, the precision and brevity of the expression, and the accuracy and felicity of the execution. Bacon's *Abridgment* was composed chiefly from materials left by Lord Chief Baron Gilbert. It has more of the character of an elementary work than Comyn's *Digest*. The first edition appeared in 1736, and was much admired, and the abridgment has maintained its great influence down to the present time, as being a very convenient and valuable collection of principles, arising under the various titles in the immense system of the English law. And in connection with this branch of the subject, it will be most convenient, though a little out of the order of time, to take notice of Cruise's recent and very valuable *Digest of the Laws of Engtand respecting Real Property*. It is by far the most perfect elementary work of the kind which we have on the doctrine of real property, and it is distinguished for its methodical, accurate, perspicuous and comprehensive view of the subject. All his principles are supported

and illustrated by the most judicious selection of adjudged cases. They are arranged with great skill, and applied in confirmation of his doctrines with the utmost perspicuity and force.

The various treatises of Lord Chief Baron Gilbert are of high value and character, and they contributed much to advance the science of law in the former part of the last century. His treatise on *Tenures* deserves particular notice, as having explained, upon feudal principles, several of the leading doctrines in Littleton and Coke; and it is a very elementary and instructive essay upon that abstruse branch of learning. His essay on the *Law of Evidence* is an excellent performance, and the groundwork of all the subsequent collections on that subject; and it still maintains its character notwithstanding the law of evidence, like most other branches of the law, and particularly the law of commercial contracts, has expanded with the progress and exigencies of society. His treatise on the *Law of Uses and Trusts* is another work of high authority, and it has been rendered peculiarly valuable by the revision and copious notes of Mr. Sugden.

The treatises on the *Pleas of the Crown*, by Sir Matthew Hale and Sergeant Hawkins, appeared early in the last century, and they contributed to give precision and certainty to that most deeply interesting part of jurisprudence. They are both of them works of authority and have had great sanction, and been uniformly and strongly recommended to the profession. Sir Martin Wright's *Introduction to the Law of Tenures* is an excellent work, and the value of it cannot be better recommended than by the fact that Sir William Blackstone has interwoven the substance of that treatise into the second volume of his *Commentaries*. Dr. Wood published in 1722, his *Institutes of the Laws of England*. His object was to digest the law, and to bring it into better order and system. By the year 1754, his work had passed through eight folio editions, and thereby afforded a decisive proof of its value and popularity. It was greatly esteemed by the lawyers of that age; and an American judge (himself a learned lawyer of the old school) has spoken of Wood as a great authority, and of weight and respect in Westminster Hall.

But it was the fate of Wood's *Institutes* to be entirely superseded by more enlarged, more critical, and more attractive publications, and especially by the *Commentaries* of Sir William Blackstone, who is justly placed at the head of all the modern writers who treat of the general elementary principles of the law. By the excellence of his arrangement, the variety of his learning, the justness of his taste,

and the purity and elegance of his style, he communicated to those subjects which were harsh and forbidding in the pages of Coke the attractions of a liberal science, and the embellishments of polite literature. The second and third volumes of the *Commentaries* are to be thoroughly studied and accurately understood. What is obsolete is necessary to illustrate that which remains in use, and the greater part of the matter in those volumes is law at this day and on this side of the Atlantic.

CHAPTER IV

THE COMMON LAW IN AMERICA

1. RECEPTION [1]

REINSCH, THE ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES (Bulletin of the University of Wisconsin, Historical Series, II, No. 4).

The earliest settlers in many of the colonies made bodies of law, which, from every indication, they considered a complete statement of the needful legal regulations. Their civilization being primitive, a brief code concerning crimes, torts, and the simplest contracts, in many ways like the dooms of the Anglo-Saxon kings, would be sufficient. Not only did these codes innovate upon, and depart from, the models of common law, but, in matters not fixed by such codes, there was in the earliest times no reference to that system. They were left to the discretion of the magistrates.

In many cases the colonists expressed an adhesion to the common law, but, when we investigate the actual administration of justice, we find that usually it was of a rude, popular, summary kind, in which the refined distinctions, the artificial developments of the older system have no place. A technical system can, of course, be administered only with the aid of trained lawyers. But these were generally not found in the colonies during the 17th century, and even far down into the 18th we shall find that the legal administration was in the hands of laymen in many of the provinces. Only as the lawyers grow more numerous and receive a better training, do we find a general reception and use of the more refined theories of the common law. It is but natural that, with increased training, the courts and practitioners should turn to the great reservoir of legal experience in their own language for

[1] Select Essays in Anglo-American Legal History, I, 367–463 and bibliography on p. 366; Loyd, Early Courts of Pennsylvania; Warren, History of the American Bar; Hilkey, Legal Development in Colonial Massachusetts, Columbia University Studies in History, Economics and Public Law, Vol. XXXVII, No. 2.

guidance and information; the courts would be more ready to favor the theory of the adoption of the common law, as it increased their importance, virtually giving them legislative power. The foregoing statements are especially true of New England, where the subsidiary force of the common law was plainly denied; where a system of popular law (*Volksrecht*) grew up; and where the law of God took the place of a secondary system.

The legal theory of the transfer has its established place in American jurisprudence; but, historically, it should be modified so as to bring out the fact that we had a period of rude, untechnical popular law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law. In this way only shall we understand, from the first, the very characteristic and far-reaching departures from older legal ideas which are found in the New World; while, at the same time, its full importance is assigned to the influence of English jurisprudence in moulding our legal thought. The theory of the courts is an incomplete, one-sided statement needing historical modification. When the courts come to analyze the nature of the law actually brought over by the colonists, they find it a method of reasoning, "a system of legal logic, rather than a code of rules"; or the rule, "live honestly, hurt nobody, and render to every man his due." Such a very indefinite conception of the matter is without value historically; on the basis of this indefinite notion there has been claimed for the courts an almost unlimited power, under the guise of selecting the applicable principles of the common law, to establish virtually new and unprecedented legal rules. On the other hand, a historical study will reveal a most interesting organic growth, and, after the records have been more fully published, no system will offer more of interest to inquiring students than that developed on American soil. The study of the documents reveals great diversities in the early systems of colonial laws. Then with the growth of national feeling there comes also a growth of unification of legal principles, for which the English common law affords the ideal or criterion. And, though during the decade immediately preceding independence, the English common law was generally praised and apparently most readily received by the larger part of American courts, still the marks of the old popular law remain strong, and most of the original features in American jurisprudence can be traced back to the earliest times.

RESOLVE OF THE GENERAL COURT OF MASSACHUSETTS BAY, 25 May, 1636 (Mass. Colonial Records, I, 174–5).

The Goun^r^, Deputy Goun^r^, Tho: Dudley, John Haynes, Rich: Bellingham, Esq., Mr Cotton, Mr Peters, & Mr Shepheard are intreated to make a draught of lawes agreeable to the word of God, w^ch^ may be the ffundamentalls of this comonwealth, & to present the same to the nexte Gen/all Court. And it is ordered, that in the meane tyme the magistrates & their assosiates shall pcede in the courts to heare & determine all causes according to the lawes nowe established, & where there is noe law, then as neere the lawe of God as they can; & for all busines out of Court for w^ch^ there is noe certaine rule yet sett downe, those of the standing counsell, or some two of them, shall take order by their best discrecon, that they may be ordered & ended according to the rule of Gods word, & to take care for all millitary affaires till the nexte Gen/all Court.

CHARTER OF THE PROVINCE OF MASSACHUSETTS BAY, 1691.

And we doe further for us our Heires and Successors Give and Grant to the said Governor and the great and Generall Court of Assembly of our said Province or Territory for the time being full power and Authority from time to time to make ordaine and establish all manner of wholsome and reasonable Orders Laws Statutes and Ordinances Directions and Instructions either with penalties or without (soe as the same be not repugnant or contrary to the Lawes of this our Realme of England) as they shall Judge to be for the good and welfare of our said Province or Territory And for the Gouernment and Ordering thereof and of the People Inhabiting or who shall Inhabit the same and for the necessary support and Defence of the Government thereof.

JOHN ADAMS, NOVANGLUS, No. VIII, 1774 (Adams, Works, IV, 122).

When a subject left the kingdom by the king's permission, and if the nation did not remonstrate against it, by the nation's permission too, at least connivance, he carried with him, as a man, all the rights of nature. His allegiance bound him to the king, and entitled him to protection. But how? Not in France; the King of England was not bound to protect him in France. Nor in America. Nor in the dominions of Louis. Nor of Sassacus, or Massachusetts. He had a right to protection and the liberties of England, upon

his return there, not otherwise. How, then, do we New Englandmen derive our laws? I say, not from parliament, not from common law, but from the law of nature, and the compact made with the king in our charters. Our ancestors were entitled to the common law of England when they emigrated, that is, to just so much of it as they pleased to adopt, and no more. They were not bound or obliged to submit to it, unless they chose it.

DECLARATION OF RIGHTS OF THE CONTINENTAL CONGRESS, 1774.

Whereupon the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases have usually done, for asserting and vindicating their rights and liberties, declare. . . .

5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

6. That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

NOTE BY HORACE GRAY, Quincy's Reports, 538–9.[1]

Immediately after the Province Charter, the General Court attempted to establish a Court of Chancery; but the act was disallowed by the King in Council. Prov. Sts. 4 & 5 W. & M. (1692–3) Anc. Chart. 222, 274. Rec. 1699, fol. 256. 2 Hutchinson's Hist. Mass. 31. 4 Dane Ab. 518. 6 *Ib.* 405. *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 368. In 1704 Attorney General Northey gave an opinion to Queen Anne that the Province Charter conferred no authority on the General Court to establish such a court. 2 Chalmers' Opinions, 182, 183. But Ryder and Strange, as Attorney and Solicitor General, in 1738 gave an opinion that the colonial assembly could establish a Court of Exchequer in South Carolina.

[1] As to Equity in America, see Select Essays in Anglo-American Legal History, II, 779–823; Loyd, Early Courts of Pennsylvania, 159–211; Gager, Equity, in Two Centuries' Growth of American Law, 115, 129–152.

2 *Ib.* 170. The condition of Chancery jurisdiction in the Province of Massachusetts Bay is thus expressed in "the opinion of a great lawyer in the Colonies," quoted by Governor Pownall, whose term of office intervened between the decision of *McNeal* v. *Brideoak*, *ubi supra* [1752], and the argument upon the Writs of Assistance [1761]. "There is no Court of Chancery in the charter governments of New England, nor any court vested with power to determine causes in equity, save only that the justices of the inferior court and the justices of the superior court respectively have power to give relief on mortgages, bonds, and other penalties contained in deeds. In all other chancery and equitable matters, both the Crown and the subject are without redress. This introduced a practice of petitioning the legislative courts for relief, and prompted those courts to interpose their authority. These petitions becoming numerous, in order to give the greater despatch to such business, the legislative courts transacted such business by orders or resolves, without the solemnity of passing acts for such purposes; and have further extended this power by resolves and orders beyond what a Court of Chancery ever attempted to decree, even to the suspending of public laws; which orders or resolves are not sent home for the royal assent." Administration of the Colonies (3d ed.) 81, 82. The jurisdiction mentioned by Governor Pownall was conferred by Prov. Sts. 10 W. 3; 12 Anne; 5 G. 1; 8 G. 2; Anc. Chart. 325, 326, 401, 402, 424, 501. And see 4 Dane Ab. 243; 6 *Ib.* 398; 7 *Ib.* 516, 518; 2 Amer. Jurist, 361, 362; Washburn's Jud. Hist. Mass. 158, 167. Governor Bernard, in his answer on the 5th of September, 1763, to the "Queries proposed by the Lords Commissioners of Trade and Plantations," for a copy of which, taken from the MSS. in the King's Library, the writer is indebted to Mr. George Bancroft, says: "It might have been made a question whether the Governor of this Province has not the power of Chancellor delivered to him with the Great Seal, as well as other Royal Governors; but it is impracticable to set up such a claim now, after a non-usage of 70 years, and after several Governors have, in effect, disclaimed it, by consenting to bills for establishing a Court of Chancery, which have been disallowed at home. A Court of Chancery is very much wanted here, many causes of consequence frequently happening, in which no redress is to be had for want of a Court of Equity. I am inclined to think that if a complainant in a matter of equity arising within this Province should file his bill in the Court of Chancery in England, suggesting there was

no Provincial Court in which he could be relieved, that the bill would be retained, in the same manner as I suppose a libel in the high Court of Admiralty would be admitted, if there was no inferior court of Admiralty in the Province, unless it was used only to enforce the necessity of establishing a Provincial Court of Equity."

WHARTON V. MORRIS, SUPREME COURT OF PENNSYLVANIA, 1785 (1 Dall. 125).

M'Kean, Chief Justice, delivered a circumstantial and learned charge to the Jury. He said, that the want of a Court with equitable powers, like those of the Chancery in England, had long been felt in Pennsylvania. The institution of such a Court, he observed, had once been agitated here; but the houses of Assembly, antecedent to the revolution, successfully opposed it; because they were apprehensive of encreasing, by that means, the power and influence of the Governor, who claimed it as a right to be Chancellor. For this reason, many inconveniences have been suffered. No adequate remedy is provided for a breach of trust; no relief can be obtained in cases of covenants with a penalty, etc. This defect of jurisdiction has necessarily obliged the Court upon such occasions, to refer the question to the Jury, under an equitable and conscientious interpretation of the agreement of the parties; and it is upon that ground, the Jury must consider and decide the present case.

STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 147–152, 156, 157.

§ 147. Plantations or colonies in distant countries are either such as are acquired by occupying and peopling desert and uncultivated regions by emigrations from the mother country, or such as, being already cultivated and organized, are acquired by conquest or cession under treaties. There is, however, a difference between these two species of colonies in respect to the laws by which they are governed, at least according to the jurisprudence of the common law. If an uninhabited country is discovered and planted by British subjects, the English laws are said to be immediately in force there; for the law is the birthright of every subject. So that wherever they go they carry their laws with them; and the newfound country is governed by them.

§ 148. This proposition, however, though laid down in such general terms by very high authority, requires many limitations,

and is to be understood with many restrictions. Such colonists do not carry with them the whole body of the English laws, as they then exist; for many of them must, from the nature of the case, be wholly inapplicable to their situation, and inconsistent with their comfort and prosperity. There is, therefore, this necessary limitation implied, that they carry with them all the laws applicable to their situation, and not repugnant to the local and political circumstances in which they are placed.

§ 149. Even as thus stated, the proposition is full of vagueness and perplexity; for it must still remain a question of intrinsic difficulty to say what laws are or are not applicable to their situation; and whether they are bound by a present state of things, or are at liberty to apply the laws in future by adoption, as the growth or interests of the colony may dictate. The English rules of inheritance, and of protection from personal injuries, the rights secured by Magna Charta, and the remedial course in the administration of justice, are examples as clear perhaps as any which can be stated as presumptively adopted, or applicable. And yet in the infancy of a colony some of these very rights and privileges and remedies and rules may be in fact inapplicable, or inconvenient and impolitic. It is not perhaps easy to settle what parts of the English laws are or are not in force in any such colony, until either by usage or judicial determination they have been recognized as of absolute force.

§ 150. In respect to conquered and ceded countries, which have already laws of their own, a different rule prevails. In such cases the crown has a right to abrogate the former laws and institute new ones. But until such new laws are promulgated, the old laws and customs of the country remain in full force, unless so far as they are contrary to our religion, or enact anything that is *malum in se;* for in all such places the laws of the conquering or acquiring country shall prevail. This qualification of the rule arises from the presumption that the crown could never intend to sanction laws contrary to religion or sound morals. But although the king has thus the power to change the laws of ceded and conquered countries, the power is not unlimited. His legislation is subordinate to the authority of Parliament. He cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion, as for instance from the laws of trade, or from the power of Parliament; and he cannot give him privileges exclusive of other subjects.

§ 151. Mr. Justice Blackstone, in his *Commentaries*, insists that the American colonies are principally to be deemed conquered, or ceded countries. His language is, "Our American plantations are principally of this latter sort [that is ceded or conquered countries], being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire), or by treaties. And, therefore, the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent dominions."

§ 152. There is great reason to doubt the accuracy of this statement in a legal view.

. . . . . .

§ 156. The doctrine of Mr. Justice Blackstone, therefore, may well admit of serious doubt upon general principles. But it is manifestly erroneous, so far as it is applied to the colonies and plantations composing our Union. In the charters under which all these colonies were settled, with a single exception, there is, as has been already seen, an express declaration that all subjects and their children inhabiting therein shall be deemed natural-born subjects, and shall enjoy all the privileges and immunities thereof. There is also in all of them an express restriction that no laws shall be made repugnant to those of England, or that, as near as may be conveniently, they shall be consonant with and conformable thereto; and either expressly or by necessary implication it is provided that the laws of England, so far as applicable, shall be in force there. Now this declaration, even if the crown previously possessed a right to establish what laws it pleased over the territory, as a conquest from the natives, being a fundamental rule of the original settlement of the colonies, and before the emigrations thither, was conclusive, and could not afterwards be abrogated by the crown. It was an irrevocable annexation of the colonies to the mother country, as dependencies governed by the same laws and entitled to the same rights.

§ 157. And so has been the uniform doctrine in America ever since the settlement of the colonies. The universal principle (and the practice has conformed to it) has been, that the common law is our birthright and inheritance, and that our ancestors brought hither with them, upon their emigration, all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundations of the common law.

2. SOURCES AND FORMS

KENT, COMMENTARIES, I, 472.

The common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors, as far as it was applicable, and was sanctioned by royal charters and colonial statutes. It is also the established doctrine, that English statutes, passed before the emigration of our ancestors, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.

The best evidence of the common law is to be found in the decisions of the courts of justice, contained in numerous volumes of reports, and in the treatises and digests of learned men, which have been multiplying from the earliest periods of the English history down to the present time. The reports of judicial decisions contain the most certain evidence, and the most authoritative and precise application of the rules of the common law. Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason; and the diligence of counsel, and the labor of judges, are constantly required, in the study of the reports, in order to understand accurately their import, and the principles they establish. But to attain a competent knowledge of the common law in all its branches has now become a very serious undertaking, and it requires steady and lasting perseverance, in consequence of the number of books which beset and encumber the path of the student.

WILLIAMS v. MILES, SUPREME COURT OF NEBRASKA, 1903 (68 Neb. 463, 470).

Pound, C.: What is the meaning of the term "common law of England," as used in chapter 15*a*, Comp. St. 1901? Does it mean the common law as it stood at the time of the Declaration of Independence, or as it stood when our statute was enacted, or are we to understand the common-law system, in its entirety, including all judicial improvements and modifications in this country and in England, to the present time, so far as applicable to our conditions? We cannot think, and we do not believe this court has ever understood,

that the Legislature intended to petrify the common law, as embodied in judicial decisions at any one time, and set it up in such inflexible form as a rule of decision. The theory of our system is that the law consists, not in the actual rules enforced by decisions of the courts at any one time, but the principles from which those rules flow; that old principles are applied to new cases, and the rules resulting from such application are modified from time to time as changed conditions and new states of fact require. *Rensselaer Glass Factory* v. *Reid*, 5 Cow. 587. "We may look to American as well as English books and to American as well as English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law. They are only evidence of law." *Forbes* v. *Scannell*, 13 Cal. 242, 286. On this ground it was held in *Sayward* v. *Carlson*, 1 Wash. St. 29, 23 Pac. 830, that a statutory provision in Washington making the common law of England the rule of decision in all courts did not confine the courts to the decisions of the English courts, and of those American courts which have followed them closely, for the interpretation of the law. Such has been the understanding of this court from the beginning. What Sir Frederick Pollock has called "the immemorial and yet freshly growing fabric of the common law" is to be our guide, not the decisions of any particular courts at any particular period. The term "common law of England," as used in the statute, refers to that general system of law which prevails in England, and in most of the United States by derivation from England, as distinguished from the Roman or civil law system, which was in force in this territory prior to the Louisiana purchase. Hence the statute does not require adherence to the decisions of the English common-law courts prior to the Revolution, in case this court considers subsequent decisions, either in England or America, better expositions of the general principles of that system.[1]

VAN NESS v. PACARD, SUPREME COURT OF THE UNITED STATES, 1829 (2 Pet. 137).

Story, J.: . . . The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright: but they brought with them and adopted only that portion which was

[1] See Pope, English Common Law in the United States, 24 Harv. Law Rev. 6.

applicable to their situation. There could be little or no reason for doubting that the general doctrine as to things annexed to the freehold, so far as it respects heirs and executors, was adopted by them. The question could arise only between different claimants under the same ancestor, and no general policy could be subserved by withdrawing from the heir those things which his ancestor had chosen to leave annexed to the inheritance. But between landlord and tenant it is not so clear that the rigid rule of the common law, at least as it is expounded in 3 East, 38, was so applicable to their situation as to give rise to necessary presumption in its favor. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The owner of the soil as well as the public had every motive to encourage the tenant to devote himself to agriculture and to favor any erection which should aid this result; yet, in the comparative poverty of the country, what tenant could afford to erect fixtures of much expense or value, if he was to lose his whole interest therein, by the very act of erection? His cabin or log hut, however necessary for any improvement of the soil, would cease to be his the moment it was finished. It might, therefore, deserve consideration whether, in case the doctrine were not previously adopted in a state by some authoritative practice or adjudication, it ought to be assumed by this court as a part of the jurisprudence of such state, upon the mere footing of its existence in the common law. At present it is unnecessary to say more than that we give no opinion on this question. The case which has been argued at the bar may well be disposed of without any discussion of it.

MENG v. COFFEE, SUPREME COURT OF NEBRASKA, 1903 (67 Neb. 500, 507).

Pound, C.: . . . Not only should the inapplicability of a common-law rule be general, extending to the whole, or the greater part of the state, or at least to an area capable of definite judicial ascertainment, to justify the courts in disregarding such rule, but we think, in view of the ease with which legislative alteration and amendment may be had, the power to declare established doctrines of the common law inapplicable should be used somewhat sparingly. In the whole course of decisions in Nebraska, from the territorial courts to the present, this power has been exercised but three times: (1) With reference to trespass upon wild lands by cattle (*Delaney* v. *Errickson*, 10 Neb. 492, 6 N. W. 600, 35 Am. Rep.

487), restricted, however, to wild lands by later adjudications (*Lorance* v. *Hillyer*, 57 Neb. 266, 77 N. W. 755); (2) with reference to the effect of covenants to pay rent in a lease after destruction of leased buildings, dissented from, however, by three of the six judges (*Wattles* v. *South Omaha Ice & Coal Co.*, 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554); and (3) with reference to estates by entirety (*Kerner* v. *McDonald*, 84 N. W. 92, 83 Am. St. Rep. 550). Of these three cases it may be remarked that the first was in line with legislation which clearly ran counter to the common-law rule, and that the other two dealt with strict feudal rules of property, based on conceptions long since become obsolete. The recent holdings as to the statute of uses (*Farmers' & Merchants' Ins. Co.* v. *Jensen*, 58 Neb. 522, 78 N. W. 1054, 44 L. R. A. 861) and the statute of Elizabeth concerning charitable uses (*In re* Creighton's Estate (Neb.) 84 N. W. 273), are of different nature. In the statute of uses the court did not have to do with a rule of the common law, but with an English statute, which was not adjustable to our legislation as to conveyances. In the statute of Elizabeth relating to charitable uses the court was again dealing with an English statute, and as that statute gave extrajudicial powers to the courts, which they could not exercise under our constitution, the question was one of legislative superseding of the rule, not of inapplicability. Thus the distinction between the case at bar and those in which common-law rules or English statutes have been set aside is readily apparent. Here we are confronted with no legislation to the contrary, nor are we dealing with an antiquated rule of feudal origin, but with an enlightened system of rules, founded on obvious principles of justice, and concededly applicable to the general conditions of the country and to the greater part of this state. Moreover, in each of the three cases in which common-law rules have been held inapplicable, there was a complete rule at hand to take the place of the one rejected, and no complicated and extensive judicial legislation was required. In the case of trespasses by cattle, the herd law was on the statute books. The rule as to the effect of covenants in a lease to pay rent was an isolated rule without collateral consequences, and the obvious and well-settled principle of apportionment governing all agreements was available in its stead; and the doctrine of tenancy by the entirety stood alone, unconnected with any general body of rules, and all cases that might have been governed by it were readily referable to the rules governing tenancy in common. In like manner, with the statute of uses

removed, we had a complete statutory system of conveyancing, and in the absence of the statute of charitable uses, there were still the general equitable powers of the court of chancery existing anterior to that statute. But while in those cases a single rule, part of no general system of modern application, was rejected, here the rules assailed are results of a general doctrine and part of a complete system, and to overthrow them would leave the whole body of the law of waters unsettled and confused. The subject calls for legislative, not for judicial, action.

POWELL v. BRANDON, SUPREME COURT OF MISSISSIPPI, 1852 (24 Miss. 343, 362).

Yerger, J.: The argument has frequently been urged, by those who assign a feudal origin to the rule, that inasmuch as the feudal system has been abolished, the reason for the rule has ceased; and, therefore, the rule itself should be abrogated. However cogent this argument may be when addressed to the legislature, yet courts of justice cannot so far recognize its potency as to make it the basis of their decisions. Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of the country must enforce it, until it be repealed by the legislature, as long as there is a subject-matter for the principle to operate upon; and this, too, although the reason, in the opinion of the court, which induced its original establishment, may have ceased to exist. This we conceive to be the established doctrine of the courts of this country, in every State where the principles of the common law prevail. Were it otherwise, the rules of law would be as fluctuating and unsettled as the opinions of the different judges administering them might happen to differ in relation to the existence of sufficient and valid reasons for maintaining and upholding them. Whatever may have been the original reason for the common law rule, that a legal title to real estate can only be conveyed by deed sealed and delivered, or whatever reason may have existed originally for the distinction between sealed and unsealed instruments and contracts, it would be difficult to assign any other at this day for their maintenance, than the fact that they are long and well settled rules of the common law. The same remark may be predicated of many other fixed and positive regulations of the common law, whose validity no one disputes or controverts. And hence it is, that the courts of every State in the Union, where the common law constitutes a part of their judicial system, governed by such

considerations, have declared the existence of the rule in Shelley's case, and have enforced it as rigorously as any other well settled principle of that law; and we are of opinion, that in common with the other principles of the common law, that rule constitutes a part of the judicial system of this State, and must be enforced, unless it has been repealed by some statutory provision.

VIDAL v. GIRARD, SUPREME COURT OF THE UNITED STATES, 1844 (2 How. 127).

Story, J.: . . . It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that State, as found in its Constitution of Government. The Constitution of 1790 (and the like provision will, in substance, be found in the Constitution of 1776, and in the existing Constitution of 1838) expressly declares, "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." Language more comprehensive for the complete protection of every variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in *Updegraff* v. *The Commonwealth* (11 Serg. & Rawle, 394).

BLOOM v. RICHARDS, SUPREME COURT OF OHIO, 1853 (2 Ohio St. 387).

Thurman, J.: . . . But were it otherwise, were such a contract void by the common law of England, it would not necessarily follow that it is void in Ohio. The English common law, so far as it is reasonable in itself, suitable to the condition and business of our

people, and consistent with the letter and spirit of our federal and state constitutions and statutes, has been and is followed by our courts, and may be said to constitute a part of the common law of Ohio. But wherever it has been found wanting in either of these requisites, our courts have not hesitated to modify it to suit our circumstances, or if necessary, to wholly depart from it. Lessee of *Lindsley* v. *Coates*, 1 Ohio, 243; O. C. 116. Christianity, then, being part of the common law of England, there was some, though an insufficient, foundation for the saying of Chief Justice Best above quoted. But the Constitution of Ohio having declared "that all men have natural and indefeasible right to worship Almighty God according to the dictates of conscience; that no human authority can, in any case whatever, control or interfere with the rights of conscience; that no man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; and that no preference shall ever be given, by law, to any religious society, or mode of worship, and no religious test shall be required, as a qualification to any office of trust or profit," it follows that neither Christianity, nor any other system of religion, is a part of the law of this state. We sometimes hear it said that all religions are tolerated in Ohio; but the expression is not strictly accurate — much less accurate is it to say, that one religion is a part of our law, and all others only tolerated: It is not by mere toleration that every individual here is protected in his belief or disbelief. He reposes not upon the leniency of government, or the liberality of any class or sect of men, but upon his natural indefeasible rights of conscience, which, in the language of the constitution, are beyond the control or interference of any human authority. We have no union of church and state, nor has our government ever been vested with authority to enforce any religious observance, simply because it is religious.

ZEISWEISS v. JAMES, SUPREME COURT OF PENNSYLVANIA, 1870 (63 Pa. St. 465).

The will in question contained the following provision: "Immediately after the death of both my said grand-nieces, then it is my will that my real estate aforesaid shall go to and be held in fee simple by the Infidel Society in Philadelphia, hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for the free discussion of religion, politics, etc."

Sharswood, J. (after holding this invalid on other grounds) said: In placing the decision on this ground, however, it must not be understood that I mean to concede that a devise for such a purpose as was evidently contemplated by this testator, even if a competent trustee had been named, would be sustained as a valid charitable use in this state. These endowments originated in England, at a period when the religious sentiment was strong, and their tendency was to run into superstition. In modern times the danger is of the opposite extreme of licentiousness. It is necessary that they should be carefully guarded from either, and preserved in that happy mean between both, which will most conduce to the true interests of society. Established principles will enable the courts to accomplish this. Charity is love to God and love to our neighbor; the fulfilment of the two great commandments upon which hang all the law and the prophets. The most invaluable possessions of man are faith, hope, charity, these three; but the greatest of these is charity. Love worketh no ill to his neighbor: therefore love is the fulfilling of the law. It is the fountain and source whence flow all good works beneficial to the souls or bodies of men. It is not easy to see how these are to be promoted by the dissemination of infidelity, which robs men of faith and hope, if not of charity also. It is unnecessary here to discuss the question, under what limitations the principle is to be admitted that Christianity is part of the common law of Pennsylvania. By the third section of the ninth article of the Constitution it is indeed declared "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship." It is in entire consistency with this sacred guarantee of the rights of conscience and religious liberty to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace. The laws and institutions of this state are built on the foundation of reverence for Christianity. To this extent, at least, it must certainly be considered as well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed to the annoyance of sincere believers who compose the great mass of the good people

of the Commonwealth: *Updegraph* v. *The Commonwealth*, 11 S. & R. 394; *Vidal* v. *Girard's Executors*, 2 Howard (U. S.) 198. I can conceive of nothing so likely — so sure, indeed, to produce these consequences, as a hall desecrated in perpetuity for the free discussion of religion, politics, *et cetera*, under the direction and administration of a society of infidels. Indeed, I would go further, and adopt the sentiment and language of Mr. Justice Duncan in the case just referred to: "It would prove a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel, and there is not a sceptic of decent manners and good morals who would not consider such a debating club as a common nuisance and disgrace to the city." Judgment affirmed.

BLACKSTONE, COMMENTARIES, I, 82.

The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see; all which lay in the same disorder and confusion as the Roman civil law, till, about the year 1151, one Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books, which he entitled *Concordia Discordantium Canonum*, but which are generally known by the name of *Decretum Gratiani*. These reached as low as the time of pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX., were published in much the same method, under the auspices ot that pope, about the year 1230, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII. about the year 1298, which is called *Sextus Decretalium*. The Clementine constitutions, or decrees of Clement V., were in like manner authenticated in 1317, by his successor John XXII., who also published twenty constitutions of his own, called the *Extravagantes Joannis*, all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes, in five books, called *Extravagantes Communes:* and all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

Besides these pontifical collections, which, during the times of popery, were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of legatine and provincial constitutions, and adapted only to the exigencies of this church and kingdom. The legatine constitutions were ecclesiastical laws, enacted in national synods held under the cardinals Otho and Othobon, legates from pope Gregory IX. and pope Clement IV. in the reign of king Henry III., about the years 1220 and 1268. The provincial constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton, in the reign of Henry III., to Henry Chichele, in the reign of Henry V.; and adopted also by the province of York in the reign of Henry VI. At the dawn of the Reformation, in the reign of King Henry VIII., it was enacted in parliament that a review should be had of the canon law; and till such review should be made, all canons, constitutions, ordinancès, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

As for the canons enacted by the clergy under James I. in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity, whatever regard the clergy may think proper to pay them.

There are four species of courts in which the civil and canon laws are permitted, under different restrictions, to be used: 1. The courts of the archbishops and bishops, and their derivative officers usually called in our law courts Christian, *curiae Christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon customs corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.

1. And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate, and *leges sub graviori lege;* and that, thus admitted, restrained, altered, new-modelled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical laws.

CRUMP V. MORGAN, SUPREME COURT OF NORTH CAROLINA, 1843 (3 Ired. Eq. 91).

Ruffin, J.: . . . Again it was said, that these are the adjudications of the ecclesiastical courts, and are founded, not on the common law, but on the canon and civil laws, and therefore not entitled to respect here. But it is an entire mistake to say, that the canon and civil laws, as administered in the ecclesiastical courts of England, are not parts of the common law. Judge Blackstone, following Lord Hale, classes them among the unwritten laws of England and as parts of the common law, which, by custom, are adopted and used in peculiar jurisdictions: 1 Bl. Com. 79; Hale's Hist. Com. L. 27, 32. They were brought here by our ancestors as part of the common law, and have been adopted and used here in all cases to which they were applicable, and whenever there has been

a tribunal exercising a jurisdiction to call for their use. They govern testamentary causes and matrimonial causes. Probate and reprobate of wills stand upon the same grounds here as in England, unless so far as statutes may have altered it: *Dickinson* v. *Stewart*, 1 Murph. 99; *Ward* v. *Vickers*, 2 Hayw. (N. C.) 164; *Redmond* v. *Collins*, 4 Dev. 430 (27 Am. Dec. 208). Divorce causes fall within the same category.

LE BARRON v. LE BARRON, SUPREME COURT OF VERMONT, 1862 (35 Vt. 365).

Poland, Ch. J.: This is a petition by the wife for a sentence of nullity of marriage, for the alleged physical impotence of the husband.

At the last stated session of the court in Washington county the petitioner filed a motion for the appointment of a commissioner or referee, to inquire and report as to the allegation of the defendant's impotence, and that the defendant be required to answer interrogatories touching said allegation; and also to submit to a personal examination by medical men, under the superintendence and direction of such commissioner. So far as the motion prays that the defendant be compelled to answer interrogatories, or to be examined by physicians, the defendant resists it. This being the first time within our knowledge that an application of this character has been made in this state, and only three members of the court being present, it was deemed advisable to hold the matter under advisement until the present term, to obtain the opinion of the whole court.

The objection to the motion is based upon this ground: that the whole jurisdiction and power of the court over the subject of granting divorces and annulling marriages, is given by statute; that the court has no power except such as the statute confers; and that, as the statute does not give the court the power to require such an examination, therefore it does not possess it. If this be the true view of the jurisdiction and power of the court — that they can only exercise such powers as are expressly given by statute — then the objection of the defendant must be sustained, and the motion denied.

To enable us to determine this question, it becomes necessary to examine into the real source and extent of the jurisdiction of the court over this subject.

The legal power to annul marriages has been recognized as existing in England from a very early period, but its administration,

instead of being committed to the common law courts, was exercised by their spiritual or ecclesiastical courts. Under the administration of those courts, for a long period of time, the principles and practice governing this head of their jurisdiction, ripened into a settled course and body of jurisprudence, like that of the courts of chancery and admiralty, and constituted, with those systems, a part of the general law of the realm, and in the broad and enlarged use of the term, a part of the common law of the land, and was so held by the courts of that country.

This country having been settled by colonies from that, under the general authority of its government, and remaining for many years a part of its dominion, became and remained subject and entitled to the general laws of the government, and they became equally the laws of this country, except as far as they were inapplicable to the new relation and condition of things. This we understand to be well settled, both by judicial decision and the authority of eminent law writers. But if this were not so, the adoption of the common law of England, by the legislature of the state, was an adoption of the whole body of the law of that country (aside from their parliamentary legislation,) and included those principles of law administered by the courts of chancery and admiralty, and the ecclesiastical courts, (so far as the same were applicable to our local situation and circumstances, and not repugnant to our constitution and laws) as well as that portion of their laws administered by the ordinary and common tribunals.

As the jurisdiction in England was exclusively committed to the spiritual courts, and had never been exercised by the ordinary law courts, the same could not be exercised by the courts of law in this country, until it was vested in them by the law-making power. As we have never had any ecclesiastical courts in this country, who could execute this branch of the law, it was in abeyance until some tribunal was properly clothed with jurisdiction over it, or rested in the legislature. It was probably on this ground that the legislatures of the states proceeded in granting divorces, as many of them did, in former times. When the legislatures establish a tribunal to exercise this jurisdiction, or invest it in any of the already established courts, such tribunal becomes entitled, and it is their duty, to exercise it, according to the general principles of the common law of the subject, and the practice of the English courts, so far as they are suited to our condition and the general spirit of our laws, or are modified or limited by our statute.

Such has been held to be the effect of a creation of a court of chancery, or giving equity jurisdiction, either total or partial, to a court of law, by the legislature. Such jurisdiction is to be exercised according to the general principles and practice of the chancery courts of the mother country.

The uniform and settled practice in the ecclesiastical courts of England, in this class of cases, is to require a medical examination, and to compel the party to submit to it, if he will not do so voluntarily. *Norton* v. *Seton*, 1 Eng. Ecc. Rep. 384; *Briggs* v. *Morgan*, *Id.* 408. In the last case, Lord Stowell states the reason and foundation of the rule: "It has been said that the means resorted to for proof on these occasions, are offensive to natural modesty; but nature has provided no other means, and we must be under the necessity of saying that all relief shall be denied, or of applying the means within our power. The court must not sacrifice justice to notions of delicacy of its own."

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Upon authority and reason, we are clearly satisfied that the power exists in the court to compel such examination, although the statute does not provide for it.

NASH v. HARRINGTON, SUPREME COURT OF VERMONT, 1826 (2 Aiken, 9).

Hutchinson, J.: . . . We are driven, then, to the question, will the court here adopt the rules of the law merchant, touching the necessity of demand upon the maker, and notice back to the indorser, in order to charge him, as the same are known in England? The court see no reason why they should not, where the circumstances of the parties do not render them inapplicable. Where the law in England requires notice to be given back on the same day, if the facilities of demand and notice back are the same here, there is no reason why the rule should not be the same. The law merchant is a part of the common law of England, and as such is adopted by statute here, so far as it is applicable to our local situation and circumstances, and is not repugnant to the constitution, or any act of the legislature of this state. And so far, the courts of this state are bound to recognize it.

THE PAQUETE HABANA, SUPREME COURT OF THE UNITED STATES, 1900 (175 U. S. 677).

Gray, J.: . . . International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton* v. *Guyot*, 159 U. S. 113, 163, 164, 214, 215.

PATTERSON v. WINN, SUPREME COURT OF THE UNITED STATES, 1831 (5 Pet. 233).

Story, J.: . . . We think it clear that by the common law, as held for a long period, an exemplification of a public grant under the great seal is admissible in evidence as being record proof of as high a nature as the original. It is a recognition in the most solemn form by the government itself of the validity of its own grant, under its own seal, and imports absolute verity as matter of record.

The authorities cited at the bar fully sustain this doctrine. There was, in former times, a technical distinction existing on this subject which deserves notice. As evidence, such exemplifications of letters patent seem to have been generally deemed admissible. But where, in pleading, a profert was made of the letters patent, there, upon the principles of pleading, the original under the great seal was required to be produced: for a profert could not be of any copy or exemplification. It was to cure this difficulty that the statutes of 3 Edw. VI., ch. 4, and 13 Eliz., ch. 6, were passed, by which patentees and all claiming under them were enabled to make title in pleading by showing forth an exemplification of the letters patent, as if the original were pleaded and set forth. These statutes being passed before the emigration of our ancestors, being applicable to our situation, and in amendment of the law, constitute a part of our common law.

SPAULDING v. CHICAGO & N. W. R. CO., SUPREME COURT OF WISCONSIN, 1872 (30 Wis. 111).

Dixon, C. J.: That the statute 6 Anne, c. 3, 6, enacted in 1707, with the interpretation heretofore supposed to have been given to it in England in the time of Blackstone and before, is in force as part of the common law of this state, was assumed by this court in the case of *Kellogg* v. *The Chicago and Northwestern Railway Company*, 26 Wis. 223, 267, 272. As will be seen by the reference, the words of that statute, "in whose house or chamber any fire shall accidentally begin," had been construed as if the statute read, "in whose house or chamber any fire shall negligently begin," thus exempting from liability, as Blackstone says, for the loss or damage sustained by others, the owner or occupant through whose negligence or through the negligence or carelessness of whose servants the fire was set, his own loss being regarded as sufficient punishment for such negligence. That statute, with the construction so said to have been put upon it in England, at and long before the time of our revolution, has no doubt generally been considered as constituting a part of the common law of this state as it probably has of all or nearly all of the other states of the Union. It was, as we have every reason to think, so looked upon as part of the law of the colonies before the revolution and during the period of their dependence upon the laws and constitutions of Great Britain.

But with respect to the other British statute upon which reliance is placed by the railway company here, and which was also enacted before the revolution, namely, the statute 14 Geo. III., c. 78, sec. 86, enacted in 1774, which enlarged the operation of the statute of Anne, by declaring "that no action, suit or process whatever, shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall after the said twenty-fourth day of June accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby," it is more than doubtful whether any effect can be given to it as a part of the common law of this country. The rule fixing the period of our revolution as the time from which the English statutes and acts of parliament shall be considered as part of the common law of this country, or that those statutes enacted before that time and which were adapted to our condition and circumstances as a people, shall be so considered, is a general one adopted for convenience merely, and which should govern in the

generality of cases, but not one intended to apply always and to all cases or to all statutes which may have been so enacted, without regard to any other facts or circumstances. The fundamental idea represented by the rule and upon which it is based is, that those statutes which were so enacted and which were suited to the condition and circumstances of our colonial ancestors, had been received, acted upon and ratified by them as part of the jurisprudence and laws of the colonies before the separation from the mother country, and which, upon the separation, the colonists took with them as the still continuing law, except where subsequently repealed or modified by positive legislative enactment. This view of the reasons and grounds of the rule would seem to exclude the statute in question from the operation of it, since the same was enacted on the very eve of the revolution, and at a time when we know our ancestors, in their colonial state, could not have become familiar with, or have ratified or adopted it, and at a time, too, when, as history shows, all or nearly all respect for British sovereignty and British laws or acts of parliament then being passed, was well nigh extinct throughout the colonies. That our ancestors did not, and could not have adopted and acted upon this statute as part of their laws before their independence, is, therefore, very certain. It is certain from a consideration of the time and circumstances under which the statute was enacted, and also from a consideration of the law as we know it to have been constantly understood and administered in this country since the revolution. As to the statute of Anne, we know that it, with the construction previously supposed to have been put upon it, has been generally understood and regarded as constituting a rule of our common law, because it has been expressly so adjudged in some cases, and because in all the history and records of our judicial proceedings there exists not a precedent, under circumstances where there might have been thousands, of an action or recovery contrary to the provisions of that statute as the same is alleged to have been understood in England and was doubtless understood in the colonies before the revolution took place. But as to this statute of Geo. III., the history of our law shows clearly and beyond the possibility of question or doubt, that it never has been so understood or applied by the courts of this country. The cases are most numerous, and to be found in the courts of almost every state of the Union, as well as in the federal courts, where actions have been maintained and recoveries had against proprietors and occupants, on whose land or estate fires have been negligently

set, or negligently permitted to begin or spread, so as to extend to and consume, or cause injury to, the property of others. In such cases it has been invariably held that the negligent party is answerable in damage for the losses of third persons so caused and sustained.

KREITZ v. BEHRENSMEYER, SUPREME COURT OF ILLINOIS, 1894 (149 Ill. 59).

Phillips, J.: . . . It is conceded that no statute exists in this state declaring the rights of a *de jure* officer to recover from a *de facto* officer the salary paid such *de facto* officer, who has discharged the duties of the office under a wrongful or mistaken purpose. There is no legislation on that subject in this state. The right of recovery, if it exists, depends, therefore, on the principles of the common law. The common law is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country. Judicial decisions of common-law courts are the most authoritative evidence of what constitutes the common law. By chapter 28, Starr & C. Stat. Ill., the common law of England is declared in force in this state. By reference to the decisions of the common-law courts of England, the common law of that country is to be found. An examination of the decisions of the courts of that country shows a uniform declaration of the principle that a *de jure* officer has a right of action to recover against an officer *de facto* by reason of the intrusion of the latter into his office, and his receipt of the emoluments thereof. Among others, the following opinions of English courts may be referred to as sustaining this right of recovery: *Vaux* v. *Jefferen*, 2 Dyer, 114; *Arris* v. *Stukely*, 2 Mod. 260; *Lee* v. *Drake*, 2 Salk. 468; *Webb's Case*, 8 Coke, 45. By the adoption of the common law of England, the principle announced in these cases was adopted as the law of this state, for the principle is of a general nature, and applicable to our constitution. On the basis of a sound public policy, the principle commends itself, for the reason that one would be less liable to usurp or wrongfully retain a public office, and defeat the will of the people or the appointing power, as loss would result from wrongful retention or usurpation of an office. The question has frequently been before the courts of the different states and of the United States, and the great weight of authority sustains the

doctrine of the common law, as shown by the opinions of the judges in different states; and in most of the states these are based on the common law, without reference to any statute.

CATHCART v. ROBINSON, SUPREME COURT OF THE UNITED STATES, 1831 (5 Pet. 264).

Marshall, C. J.: . . . This being a voluntary conveyance, is, at this day, held by the courts of England to be absolutely void under the statute of 27 Elizabeth, against a subsequent purchaser. even although he purchased with notice. (1 Mad. Ch. 271, 18 Ves. 110; 2 Taunton, 523). Their decisions do not maintain that a transaction valid at the time is rendered invalid by the subsequent act of the party. They do not maintain that the character of the transaction is changed, but that testimony afterwards furnished may prove its real character. The subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent purchaser.

The statute of Elizabeth is in force in this district. The rule which has been uniformly observed by this court in construing statutes is to adopt the construction made by the courts of the country by whose Legislature the statute was enacted. This rule may be susceptible of some modification, when applied to British statutes which are adopted in any of these States. By adopting them they become our own as entirely as if they had been enacted by the Legislature of the State. The received construction in England at the time they are admitted to operate in this country indeed, to the time of our separation from the British empire — may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions, and certainly they are entitled to great respect, we do not admit their absolute authority. If the English courts vary their construction of a statute which is common to the two countries, we do not hold ourselves bound to fluctuate with them.

At the commencement of the American Revolution the construction of the statute of 27 Elizabeth seems not to have been settled. The leaning of the courts towards the opinion that every voluntary settlement would be deemed void as to a subsequent purchaser was very strong, and few cases are to be found in which such conveyance has been sustained. But these decisions seem to have been

made on the principle that such subsequent sale furnished a strong presumption of a fraudulent intent, which threw on the person claiming under the settlement the burden of proving it from the settlement itself, or from extrinsic circumstances, to be made in good faith, rather than as furnishing conclusive evidence not to be repelled by any circumstances whatever.

There is some contrariety and some ambiguity in the old cases on the subject; but this court conceives that the modern decisions establishing the absolute conclusiveness of a subsequent sale to fix fraud on a family settlement, made without valuable consideration — fraud not to be repelled by any circumstances whatever — go beyond the construction which prevailed at the American Revolution, and ought not to be followed.

The universally received doctrine of that day unquestionably went as far as this. A subsequent sale, without notice, by a person who had made a settlement not on valuable consideration, was presumptive evidence of fraud, which threw on those claiming under such settlement the burden of proving that it was made *bona fide*. This principle, therefore, according to the uniform course of this court, must be adopted in construing the statute of 27 Elizabeth as it applies to this case.

In *Fable* v. *Brown*, 2 Hill. Eq. (S. C.), 378, 390 (1835), Harper, J., says:

With respect to the civil law, however enlightened and admirable a system of jurisprudence it may be, it is not our law, nor have our courts any authority to declare it so. Our legislature has adopted another system of laws. Where our law is obscure or doubtful, it is frequently of great utility in explaining or determining it, more especially as a great portion of our law was derived from that source. But if the common law be clear, we are not authorized to depart from it because the provisions of another system may be better and more suited to our circumstances; nor if it be defective, are Courts authorized to supply the deficiency by drawing from a foreign source.[1]

TUCKER v. ST. LOUIS LIFE INS. CO., SUPREME COURT OF MISSOURI, 1876 (63 Mo. 588).

Sherwood, J.: . . . The code is not sufficiently comprehensive to embrace every varied phase which a case may assume before reaching judicial determination, and in consequence of this, resort must be frequently had to common law methods of procedure, both in ordinary actions at law, as well as in proceedings looking merely to equitable relief. Numerous decisions of this court exemplify this.

[1] On the influence of the civil law upon our present law see Pound, the Influence of French Law in America, 3 Ill. Law Rev. 354.

This being the case, and the code not prescribing the method to be pursued where a defendant asks affirmative relief from a co-defendant, except that a judgment giving affirmative relief may be rendered in such cases (Wagn. Stat. 1051, 2) we must look to a certain extent to the rules of pleading and practice adopted by courts of chancery.

MATHEWSON v. PHOENIX IRON FOUNDRY, UNITED STATES CIRCUIT COURT, District of Rhode Island, 1884 (20 Fed. Rep. 281).

Colt, J.: . . . But it is said that common-law marriages were never considered valid in Rhode Island. The question has not been passed upon by the state court. The argument is based upon the history of legislation upon the subject, and especially upon the older statutes. The earliest statute relating to marriage was passed at the first session of the general assembly ever held in Rhode Island, in 1647, and it provided that no other marriages should be held lawful except those contracted according to the form of the statute. The act declares:

"No contract or agreement between a man and woman to owne each other as man and wife shall be owned from henceforth threwout the whole colonie as a lawful marriage, nor the children or issue so coming together to be legitimate or lawfullie begotten, but such as are in the first place with the parents, then orderly published in two severall meetings of the townsmen, and lastly confirmed before the head officer of the town, and entered into the towne clerk's booke."

Then follows a penalty against those going contrary to the "present ordinance." 1 Col. Rec. 187.

By act of March 17, 1656, parties were required to publish their intention of marriage, and objection to such marriage might be heard before two magistrates, when, if disallowed, it was referred to the "general court of tryalls." *Id.* 330.

The act of May 3, 1665, after condemning the loose observance of the statute of 1647, orders that act and subsequent acts to be punctually observed, and inflicts an additional penalty of fornication on persons who should presume to marry otherwise, or live together as man and wife. The act then proceeds expressly to validate the relations of all such then living within the colony "that are reputed to live together as man and wife by the common observation or account of their neighborhood." 2 Col. Rec. 104.

By the act of 1701 it was ordered that all marriages take place after due publication of intentions, etc., and a fine was imposed on officers presuming to join persons in marriage without such publication excepting those married according to the laws, customs and ceremonies of the church of England and Quakers. The exception was afterwards extended to Jews. This act was entitled, "An act for preventing clandestine marriages," and this same title we find in the several subsequent revisions of the statutes until the revision of 1857. 3 Col. Rec. 435; Pub. Laws, 1663–1745, p. 30; Digest of 1767, pp. 172–175.

By act of December, 1733, settled ministers and elders of every denomination were authorized to join persons in marriage after due publication and upon receiving certificate. They were required to keep and return to the town clerk a record thereof for registry, and a fine was imposed upon them for marrying without publication. 4 Col. Rec. p. 490; Pub. Laws 1663–1745, p. 176.

It is claimed that these enactments are controlling, and that they show that common-law marriages were never recognized in Rhode Island. The common law has always existed in Rhode Island, except so far as modified or changed by statute. This is true of marriage, as well as other subjects. The legislature may have seen fit in early times to do away entirely with the common law, and to make marriage illegal unless it conformed to the statutory regulations. But if the legislature had at any time repealed all statutes on the subjects, the common law would have been revived. And, in so far as the legislature has seen fit to change the statute, to make it less restrictive by not declaring all other marriages illegal, as in the earliest enactments, in so far it has restored the common-law right. If, upon a proper construction of the statute in force, we find the common-law right is not denied, then it still exists, though it may not have existed under former and different statutes. Unless the statute under consideration, upon a proper construction, prohibits marriages *per verba de praesenti*, we do not think we should, by implication derived from old statutes, decide against their validity. To make marriages void and children illegitimate, by implication, is a serious thing. Because, under earlier statutes, a marriage not made in conformity therewith, may have been invalid, we do not feel warranted in implying that such is the proper interpretation of the statute of 1857. We think it safer to hold that in modifying the terms of the statute, the legislature intended to modify the law; and, as we have before said, our conclusion is that the

statute of 1857 does not make a marriage *per verba de praesenti*, or at common law, void; this being the construction put upon similar statutes in most of the states, and in the Supreme Court of the United States.

UNITED STATES v. ARREDONDO, SUPREME COURT OF THE UNITED STATES, 1832 (6 Pet. 691).

Baldwin, J.: . . . There is another source of law in all governments — usage, custom, which is always presumed to be adopted with the consent of those who have been affected by it. In England, and in the States of this Union which have no written constitution, it is the supreme law; always deemed to have had its origin in an act of a State Legislature of competent power to make it valid and binding, or an act of Parliament; which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. (2 Co. Inst. 58; Wills, 116.) So it is considered in the States and by this court. (3 Dall. 400; 2 Peters, 656, 657.)

A general custom is a general law, and forms the law of a contract on the subject-matter; though at variance with its terms, it enters into and controls its stipulations as an act of Parliament or State Legislature. The court not only may, but are bound to notice and respect usage and general customs as the law of the land equally with the written law, and, when clearly proved, they will control the general law; this necessarily follows from its presumed origin — an act of Parliament or a legislative act. Such would be our duty under the second section of the Act of 1824, though its usages and customs were not expressly named as a part of the laws or ordinances of Spain. The first section of that act, giving the right to claimants of land under titles derived from Spain to institute this proceeding for the purpose of ascertaining their validity and jurisdiction to the court to hear and determine all claims to land which were protected and secured by the treaty, and which might have been perfected into a legal title under and in conformity to the laws, usages and customs of Spain, makes a claim founded on them one of the cases expressly provided for. We cannot impute to Congress the intention to not only authorize this court, but to require it to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice; by such a solemn mockery of it as would be evinced by excluding from our consideration usages and customs (which are the law of every government)

for no other reason than that, in referring to the laws and ordinances in the second section, Congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain. We might as well exclude a royal order because it was not called a law. We should act on the same principle if the words of the second section were less explicit, and according to the rule established in *Henderson* v. *Poindexter*, 12 Wheat. 530, 540.

KING v. EDWARDS, SUPREME COURT OF MONTANA, 1870 (1 Mont. 235).

Knowles, J.: The mining customs of any particular mining district have the force and effect of laws, or, in other words, are laws. The local courts in each one of the States and Territories, where placer mining is prosecuted to any extent, have so recognized them, and finally, Congress, by an act in July, 1866, recognized these rules and customs as law.

The title to mineral lands is vested in the United States. Any citizen of the United States, or any person who has declared his intention to become such, may, by complying with the local rules and customs of any district, become vested with the right to possess and mine any specific portion of mining ground. The customs which point out the manner of locating mining ground are conditions precedent. A substantial compliance with them is necessary. The right to possess and mine any mining claim is derived from the United States by virtue of this compliance. The United States is divested of this right as effectually as if these rules and customs were acts of Congress, for they now are the American common law on mining for precious metals.

JENNISON v. KIRK, SUPREME COURT OF THE UNITED STATES, 1878 (98 U. S. 453, 456).

Field, J.: The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State,

which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and cañons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently

carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through cañons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years — from 1848 to 1866 — the regulations and customs of miners, as enforced and moulded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it was declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government. The senator of Nevada, Hon. William M. Stewart, the author of the act, in advocating its passage in the Senate, spoke in high praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not

in conflict with the Constitution or laws of the State or of the United States, should govern their determination: and a series of wise judicial decisions had moulded these regulations and customs into "a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, under the implied sanction of a just and generous government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., part iv., pp. 3225–3228.

These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and moulded by its courts, and seeking to give title to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized

by the local customs, laws, and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," cannot be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water-rights, being recognized in the same manner, should be "acknowledged and confirmed"; but where ditches subsequently constructed injured by their construction the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purposes of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts.

BLACKSTONE, COMMENTARIES, I, 76.

When a custom [1] is actually proved to exist, the next inquiry is into the legality of it; for, if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus est*" is an established maxim of the law. To make a particular custom good, the following are necessary requisites:

1. That it have been used so long, that the memory of man runneth not to the contrary. So that, if any one can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.

2. It must have been continued. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which

[1] Gray, Nature and Sources of Law, Chap. XII; Austin, Jurisprudence (3 ed.) 103 ff; Salmond, Jurisprudence, §§ 42–43, 46–48; Holland, Jurisprudence, Chap. V, Subdiv. I; Clark, Practical Jurisprudence, 324–334. See also Carter, Law, Its Origin, Growth and Function, 18, 24, 118 ff., 158, 241 ff.

will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the right; for an interruption of the possession only, for ten or twenty years, will not destroy the custom. As if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove: but if the right be any how discontinued for a day, the custom is quite at an end.

3. It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

4. Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his, and then the tenants will lose all their profits.

5. Customs ought to be certain. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of law is, *id certum est, quod certum reddi potest.*

6. Customs, though established by consent, must be (when established) compulsory; and not left to the option of every man, whether he will use them or no. Therefore a custom, that all the

inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

Lastly, customs must be consistent with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent; which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.

LEACH v. PERKINS, SUPREME COURT OF MAINE, 1840 (17 Me. 462).

Shepley, J.: The rights of parties are to be determined by law, and not by any local custom or usage, unless there be proof, that such custom or usage is certain, general, frequent, and so ancient as to be generally known and acted upon. In such cases, if the courts adjudge it to be reasonable, it affects the right of the parties upon the presumption, that they have made their contract with reference to it: 3 Wash. C. C. 149; 8 Serg. & R. 539. The usages of trade in a particular city or place, are thus received to explain the intention of the parties, and to ascertain their rights under a contract presumed to be made with reference to them: 2 Bos. & Pul. 432; 3 *Id.* 23; 7 Mass. 36; 3 Wend. 283. The usage of trade has also been admitted to explain what the parties intended by the use of a doubtful word or phrase, or term of art, in a policy of insurance, bill of lading, and deed: 7 Johns. 385; 8 Serg. & R. 535; 6 Greenl. 154. And in a particular profession, art, or branch of trade, as among printers: 1 S. C. Const. 308; 3 Greenl. 276. And among carriers: 2 Nott & M. 9; 3 Day, 346; 3 Conn. 9. And in the lumber trade: 6 Greenl. 200. The usages of banks in certain cities and places have been received upon the presumption that the parties contracted with reference to them: 11 Mass. 85; 9 Wheat. 581. So has a custom in certain places, that a tenant should take "the way-going crop": 5 Binn. 287; or receive compensation for labor for the benefit of the forthcoming crop: 1 Brod. & B. 224. In these and many other cases, usage has been received to explain the intention of the parties in making a contract, and thus to have an influence upon their rights.

But custom does not appear to have been received to establish the right, or to prove the origin of the relation by which the parties become responsible to each other. Mr. Justice Thompson, in speaking of the admission of the usage of the departments of the government to allow a commission on the disbursements of the public money, excludes any inference that it might be received for such a purpose, remarking that "it was not for the purpose of establishing the right, but to show the measure of compensation and the manner in which it was to be paid ": 7 Pet. 28.

The case of *Thompson* v. *Harrington*, 12 Pick. 425, has been regarded in the argument as authorizing the reception of usage as corroborative proof of the existence of a contract. In the report of the case it is stated, that the judge instructed the jury, that "usage might serve in some measure to show what was the intention of the parties, or to substantiate the testimony" of the witnesses. In the opinion of the court no allusion is made to any such instruction, and the principle upon which the court sustained the admission is in accordance with the preceding cases in that state. The language of the court is, "usage was admissible in evidence to explain the act of the owners, and to enable the jury to determine whether that act amounted to a letting to hire, or an appointment of a master." The customs or usages here alluded to are not those customs which have existed in a place or country so long, that the memory of man runneth not to the contrary, and which, when established as the rules of the common law require, become a part of it; but are such as are to be established by the proof of the facts showing the accustomed mode of dealing or of conducting a certain trade or branch of business. And when the mode of conducting the business, or in other words, the usage is proved, the law determines, as in other cases, what are, under the circumstances, the rights of the parties. And it is no more competent to prove what would be the legal rights of the parties arising out of such usage, than to prove by witnesses the law of the contract in any other case.

Whether a usage is proved, is a fact for the jury to find: 2 Gill & J. 136. But it would be the duty of the court to instruct them that, if it was not proved to be certain and general, and to partake of the other requisites, before stated, that the testimony should have no influence upon the rights of the parties.

The custom as stated in this bill of exceptions is presented rather as a mode agreed upon among the parties interested to build vessels, than as a well established method of actually conducting the process

of building: and proof was admitted, "that the owners were not jointly responsible for materials and labor for the vessel, and that no one was authorized to make contracts for materials and labor, etc., for the vessel, so as to bind the owners generally," apparently as part of the proof of the custom. It is alleged in argument, that testimony to prove not only the custom but its legal effect upon the rights of the parties, was not in fact admitted, but the language used does not appear to be susceptible of any other construction. It may be that upon a new trial the facts in relation to the manner of building in the place where the vessel was built, will be so fully proved as to establish a usage with all the necessary requisites to authorize the presumption, that these parties contracted with reference to it; but as it is presented in this bill of exceptions, the evidence should not have been admitted.

If the plaintiff fails in establishing any usage, he may prove that the parties building the vessel agreed among themselves, as stated, that his contract was made with a knowledge of and in obedience to such agreement, and thus be entitled to recover. Nor is there any necessity, as the argument supposes, that such a mode of building vessels should be abandoned if the usage fails, for the parties may accomplish the object of relieving themselves from responsibility for the whole of the materials and labor by an agreement to that effect among themselves, and by taking care to make it known to each one with whom a contract is made, so as to have proof that he contracted with a knowledge that he must rely only upon the person with whom he contracted.

Exceptions sustained and new trial granted.

TREMBLE v. CROWELL, SUPREME COURT OF MICHIGAN, 1869 (17 Mich. 493).

Graves, J.: The defendants in error sued Tremble in the court below, in *assumpsit*, and sought to recover from him certain money which they alleged they had paid him for a quantity of fish he had sold to them, and which had proved to have been unsound and valueless. The declaration contained the common and money counts, and also a special count in which the defendants in error alleged in the usual manner that the plaintiff in error warranted the fish to be good, sound, and fit for the market.

The plaintiffs below, after giving evidence to show that they were wholesale fish dealers at Toledo, in the state of Ohio, and purchased of the defendant, who was a fisherman at Bay City, and paid

therefor, about $1500 worth of fish, of which, on their arrival at Toledo, some sixty-eight half barrels were found to be spoiled and valueless, offered evidence to prove that there was a settled uniform usage, that under a contract for the sale of fish for cash, and where there was no express warranty if the fish or any portion of them proved to be unsound, the vendor should be liable to pay back to the purchaser the money paid for such unsound fish, and the evidence was admitted under objection.

Subsequently the circuit judge, in submitting the case to the jury, instructed them that if they should find such a settled uniform usage it was valid, and that, by virtue thereof, the plaintiffs would be entitled to recover the money paid for the unsound fish, unless the parties made a contract excluding, by its very terms, the operation of such usage; and to this direction the defendant below excepted.

These objections present the main questions in the case.

It will be observed that the usage relied on would, if established, place the dealers in fish in Bay City and vicinity, in a position very different from that held by persons in the same business in other parts of the state; and would tacitly annex to all contracts there made for the sale of fish, unless expressly excluded by the contract itself, a stipulation which would tend, inevitably, to supersede all official as well as private inspection; and would prescribe a specific redress in case of the sale of "tainted" or "damaged" fish, entirely different from that marked out by the statute.

Would such a usage be a reasonable one if conclusively proved? It appears to me that it would not.

The legislature have thought proper to provide for a system of public inspection of various articles, and among them the article of fish; and have made numerous and precise regulations on that subject: 1 Comp. L., p. 386; also, 392 to 394.

They have provided for the election of inspectors; have required them to make inspection when desired so to do; have specified the manner in which it should be done; have provided that the fish inspected should be designated by the inspector as number "one," or "two," according to quality, and have required the inspectors to report annually to the secretary of state the quantity, quality, and kinds inspected during the year.

They have also provided that, if any person shall sell, within the state, or export, or cause to be exported therefrom, any tainted or otherwise damaged fish, unless with the intent that the same shall

be used for some other purpose than as food, he shall forfeit $10 for every one hundred pounds of such fish; and that upon the trial, the burden of proof shall be upon the vendor to show for what purpose such fish were sold or exported.

By another section they have declared that it shall not be obligatory upon any one to have fish inspected; but that all contracts for the sale of fish shall be deemed made with reference to those provisions of the statute regulating the quality, quantity, and other descriptions, unless the parties otherwise expressly agree: Comp. L., § 1236.

Although the statute is not imperative on the subject of inspection, the penal provision against the sale of "tainted" or damaged fish is so; and the whole act is plainly expressive of a legislative purpose to provide the system of regulations for the trade, which the legislature deemed the best. Whether the usage in question would directly and necessarily conflict with any of these statutory regulations need not be determined, since in my opinion the usage cannot be sustained if found to be inconsistent with the policy or spirit of the statute.

It appears to me to be a part of the policy of the law in question to encourage the practice of official inspection and discourage a contrary course, to regulate the traffic in fish in the manner most likely to insure fairness between dealers, and maintain everywhere the reputation of a most important branch of the commerce of the state.

As the supposed usage assumes that the article is purchased without the safeguard of inspection, and that the buyer will be saved from loss on a purchase of uninspected fish by the right given him by the usage to recover of the vendor the price actually paid; the effect of the usage must be to cause dealers to dispense with inspection, and pave the way for those consequences which the law was designed to avert; and, at the same time, to defeat the desirable objects which the legislature intended to promote.

Without attempting to contrast the usage with specific provisions, I think there can be no doubt but that it would introduce a practice altogether at variance with the spirit and plain policy of the inspection laws; and that if it were accepted as binding, it would go far to render those laws nugatory, and to supersede inspection altogether by responsible public officers.

Entertaining this opinion, I think that the usage in question was and is invalid, and that it could furnish no basis for a recovery in this case.

This conclusion, if correct, makes it unnecessary to consider the other questions in the case. I think the judgment of the court below should be reversed with costs.

The other justices concurred.

CHAPTER V

COURTS: THEIR ORGANIZATION AND JURISDICTION

1. SELF-HELP

BLACKSTONE, COMMENTARIES, III, 2, 15.

The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action. For which reason our chief employment in this book will be to consider the redress of private wrongs by suit or action in courts. But as there are certain injuries of such a nature that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy; of which I shall first of all treat, before I consider the several remedies by suit: and, to that end, shall distribute the redress of private wrongs into three several species: first, that which is obtained by the mere act of the parties themselves; secondly, that which is effected by the mere act and operation of law; and, thirdly, that which arises from suit or action in courts, which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And first, of that redress of private injuries which is obtained by the mere act of the parties. This is of two sorts: first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both which I shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is

I. The defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or

any of these his relations, be forcibly attacked in his person or property it is lawful for him to repel force by force; and the breach of the peace which happens is chargeable upon him only who began the affray. For the law in this case respects the passions of the human mind, and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried unless it were permitted a man immediately to oppose one violence with another. Self-defense, therefore as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay, even for homicide itself: but care must be taken that the resistance does not exceed the bounds of mere defense and prevention: for then the defender would himself become an aggressor.

II. Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant: in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed; and his wife, children or servants concealed or carried out of his reach; if he had no speedier remedy than the ordinary process of law. If therefore he can so contrive it as to gain possession of his property again without force or terror, the law favors and will justify his proceeding. But as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my

horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law.

III. As recaption is a remedy given to the party himself for an injury to his personal property, so, thirdly, a remedy of the same kind for injuries to real property is by entry on lands and tenements when another person without any right has taken possession thereof. This depends in some measure on like reasons with the former; and like that, too, must be peaceable and without force. There is some nicety required to define and distinguish the cases in which such entry is lawful or otherwise; it will therefore be more fully considered in a subsequent chapter; being only mentioned in this place for the sake of regularity and order.

IV. A fourth species of remedy by the mere act of the party injured is the abatement or removal of nuisances. What nuisances are, and their several species, we shall find a more proper place to inquire under some of the subsequent divisions. At present, I shall only observe, that whatsoever unlawfully annoys or doth damage to another is a nuisance; and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it. If a house or wall is erected so near to mine that it stops my ancient lights, which is a private nuisance, I may enter my neighbor's land and peaceably pull it down. Or if a new gate be erected across the public highway, which is a common nuisance, any of the king's subjects passing that way may cut it down and destroy it. And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth case in which the law allows a man to be his own avenger, or to minister redress to himself, is that of distraining cattle or goods for the non-payment of rent, or other duties; or distraining another's cattle damage-feasant, that is, doing damage or trespassing upon his land. The former intended for the benefit of landlords, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter arising from the necessity of the thing itself, as it might otherwise be impossible at a future time to

ascertain whose cattle they were that committed the trespass or damage.

VI. The seizing of heriots, when due on the death of a tenant, is also another species of self-remedy, not much unlike that of taking cattle or goods in distress. As for that division of heriots which is called heriot-service, and is only a species of rent, the lord may distrain for this as well as seize; but for heriot-custom (which Sir Edward Coke says lies only in prender, and not in render) the lord may seize the identical thing itself, but cannot distrain any other chattel for it. The like speedy and effectual remedy of seizing is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, deodands, and the like; all which the person entitled thereto may seize without the formal process of a suit or action. Not that they are debarred of this remedy by action; but have also the other and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature as might be out of the reach of the law before any action could be brought.

BOWLER v. ELDREDGE, SUPREME COURT OF ERRORS OF CONNECTICUT, 1846 (18 Conn. 1).

Williams, C. J.: . . . The 4th plea rests upon very different considerations.

The defendants do not, in that, rely upon a decree or order, the correctness of which cannot be examined; but they say, the facts which exist will justify the acts they have done; and they offer to prove these facts before the court.

They say, this vessel was in the legal custody and possession of an officer of the United States, by virtue of legal process, and had been wrongfully taken out of his possession; and he therefore had a right to repossess himself of it; and this he did through the defendants, who acted as his servants and agents, and by his authority.

The plaintiff, on the other hand, contends, that if this were so, they had no right to take this property by force out of his possession; that it was in custody of the law, and must there remain until taken out by legal process.

It is not claimed that any force was used by the defendants, but such as is implied in every wrongful act of trespass. The words *vi et armis* imply nothing more. 3 Burr. 1701, 1731. The question then arises, whether, if this property has been illegally taken from the custody of the defendant, he may repossess himself of it.

As to real estate, there cannot be a doubt that at common law, if the owner has been dispossessed, he might, within a reasonable time, if he could prevail by fair means, enter by force and take possession of his own estate. 1 Hawk. Pl. Cr. ch. 64, p. 274. 13 Vin. Ab. 380. Co. Litt. 257, n. 1. *Hyatt* v. *Wood*, 4 Johns. R. 150. *Ives* v. *Ives*, 13 Johns. R. 237. And although, to prevent breaches of the peace, and the oppression of the weak by the powerful, forcible entries are by statute restrained, yet even at this day, if a tenant hold over, and the landlord takes possession by force and strong hand, so that he may be indicted for a forcible entry, the tenant cannot treat him as a trespasser. *Taunton* v. *Costar*, 7 Term R. 431. And in a more recent case, where the landlord broke open the doors of the house with a crowbar, after his tenant's lease had expired, no person being in, and only some of the tenant's furniture remaining, he was justified in an action of trespass brought by the tenant against him. *Turner* v. *Meymott*, 1 Bing, 158 (8 E. C. L. 280). And it is said, by a highly respectable writer on common law, the force may not be justifiable; the party may be answerable for a breach of the peace or a forcible entry; but not in an action of trespass, to a party in the wrongful possession; for the possession is a sufficient ground to sustain an action of trespass against a wrongdoer. It is otherwise, when the person entering shows a legal title. Read's case, 6 Rep. 24, 2 Saund. 47, c. *Hyatt* v. *Wood*, 4 Johns. R. 158; 1 Johns. R. 44. And it is said, by the author of the commentaries, that where one is deprived of his property in goods or chattels personal, or where one's wife, child or servant is wrongfully detained, the owner, husband, parent or master may lawfully claim and retake them, wherever he happens to find them. 3 Bla. Com. 41. 1 Sw. Dig. 461. And a writer on criminal law, of high authority, says, "It seems certain, that even at this day, he who is wrongfully dispossessed of his goods, may justify the retaking of them by force, from the wrongdoer, if he refuses to redeliver them; for, the violence which happens through the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just cause of complaint, inasmuch as he might have prevented it by doing as he ought." 1 Hawk. Pl. Cr. 274, ch. 64. Blackstone and other commentators very properly say, that this may be done, provided it be not done in a riotous manner, and not attended with a breach of the peace. They do not, however, by this mean, that if a husband reclaims his wife, or a parent his child, or an owner his goods, he will, for such act, be liable in an action of trespass to the

wrong-doer; though he might be answerable for a breach of the peace. Hawkins explains this more fully than the other authors above cited, when speaking of forcible entry; for, says he, however he may be punishable at the king's suit, for doing what is prohibited by statute, as a contemner of the law and disturber of the peace, he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. Ch. 64, sect. 2. And in *Lee* v. *Atkinson*, Cro. Jac. 236; S. C., Yelv. 172, where the owner of a horse let it for two days, and finding that the person who hired it was going another way than that for which he hired the horse, by force retook the horse within the two days; it was held that he was not justified, not because he might not have right to retake his own, but he had parted with the possession for those two days; thus recognizing the right of recapture, though not under such circumstances. So, too, if a distress is taken without cause, or contrary to law, before it is impounded: the party may rescue it. Co. Litt. 160–1, 3 Bla. Com. 12. *Cotsworth* v. *Betison*, 1 Ld. Raym. 104; S. C., 1 Salk. 247.

It is said, however, that this property was in custody of the law; and, therefore, the defendants had no right to reclaim it in this way. That must depend upon the other question, whether it was lawfully detained by the officer; for if not, his official character could not give him, as against him who had a prior claim, a right. His process, though good as against the party, would not give him a right to take the goods of a third person, or the goods of this person, out of the lawful possession of another.

This court has decided that a person committed to prison under an illegal process was not accountable, in a public prosecution, for freeing himself from that imprisonment, even by a breach of the peace. And we are of opinion that the marshal of New York, having the legal custody of this property had a right to repossess himself of it when in the hand of this plaintiff. We, therefore, are of opinion that the 4th plea is sufficient; and so we advise the superior court.

In this opinion the other judges concurred.

SPENCER v. MCGOWEN, SUPREME COURT OF NEW YORK, 1835 (13 Wend. 256).

Error from the Tompkins C. P. Spencer sued M'Gowen and Shepard, in an action of trespass for the taking of a horse, which had been delivered to him Nov. 3, 1830, as the plaintiff in a writ of

replevin issued against one Carter. The plaintiff further proved that the horse in question had been mortgaged with other property, by Carter, to one M'Cormick, to secure the payment of a certain sum of money; that the mortgage had been assigned to him, the plaintiff; that it had become forfeited; and that by an award of arbitrators, made in pursuance of a submission between him and Carter, he had a lien upon the horse. The defense set up on the trial was, that Carter was a tenant of one Bloodgood, and that previous to the issuing of the writ of replevin, to wit: Oct. 25, 1830, the horse in question was taken, with other property, as a distress for rent, by M'Gowen as the bailiff of the landlord. Shepard was the receiptor of the property, and it was left on the premises. The horse having subsequently been delivered by the sheriff to Spencer, by virtue of the writ of replevin, Shepard took the horse from Spencer's stable, and delivered him to M'Gowen, who sold him by virtue of the distress warrant. The jury, under the charge of the court, found a verdict for the defendants, on which judgment was entered. The plaintiff having excepted to the charge of the court, sued out a writ of error.

By the Court, Sutherland, J.: It is contended by the plaintiff in error, that under the Act in relation to the Action of Replevin, 2 R. S., 525, sec. 13, etc., the defendants were bound to have demanded a jury from the sheriff to try their title to the horse, before they could summarily regain the possession of him. The 13th section provides, that if the defendant in the action of replevin, or any other person who may be in possession of the goods and chattels specified in the writ, shall claim property therein or in any part thereof, he may give notice to the sheriff thereof, and demand a jury to try his title. The 14th and 15th sections regulate the mode of proceeding. The 16th section provides that if the jury find against the title of the claimant, the sheriff shall forthwith make deliverance to the plaintiff in replevin. The 17th enacts that if the jury find in favor of the claimant, the sheriff shall not deliver the property to the plaintiff in replevin, unless he will indemnify him to his satisfaction, and refund to the claimant the fees of the sheriff and jury in trying the title. These provisions are designed rather for the security and benefit of the sheriff than of the party claiming the property; for although the jury may find in favor of the title of the claimant, the sheriff may still and perhaps must deliver the property to the plaintiff in replevin, if he will indemnify him. The person claiming title to the property is not prohibited by these

provisions from taking any other course to try or enforce his right, which upon general principles he might have done before this Act was passed.

If the property of A is in the possession of B, and is taken under an execution or a writ of replevin against B, if A can peaceably obtain the possession of it, and can establish his title, the plaintiff in the execution or replevin cannot maintain trespass against him. A man is never a trespasser in peaceably obtaining possession of his own property. *Hyatt* v. *Wood*, 3 Johns., 239; 4 *Id.*, 150, 313. The defendants in this case had a special property in the horse, by virtue of the proceedings under the landlord's warrant, when the replevin was served. The replevin suit was not against them, but against the tenant.

MOORE v. SHENK, SUPREME COURT OF PENNSYLVANIA, 1846 (3 Pa. St. 1).

Gibson, C. J.: . . . But the direction that the property was not revested in the defendant by his demand of it and offer to restore it, because he repossessed himself of it by force, was wrong. Each party had expressly reserved a right to put an end to the bargain by giving back what he had received under it. When, therefore, the defendant signified his determination to rescind, and tendered the animal with the money he had received, the parties were *ipso facto* remitted to their original rights. The remitter was so entire that the defendant could have maintained trover or replevin on the wagoner's refusal to deliver. Was it disturbed or prevented by any act of force subsequently committed in regaining the possession pursuant to it? It is true that the right of recaption cannot be pleaded in justification of violence. "If, for instance," says Sir William Blackstone (3 Com. 5), "my horse is taken away, and I find him in a common, a faire, or a public inn, I may lawfully seize him to my own use: but I cannot justify breaking open a private stable, or entering on the grounds of a third person to take him, but must have recourse to an action at law": in other words, the right of recaption will not justify a collateral trespass committed in the prosecution of it. But recaption, being founded on a title already existing, is not an act necessary to revest the title, like an entry on land for a condition broken; but it is a remedy, like an action, to regain the possession by virtue of a title complete. If it were the former, an action could be maintained without at least an attempt at recaption precedent to it. The defendant's original

title was restored by the tender, and no principle of the common law declares his illegal enforcement of it to be a forfeiture of it. Even a right of entry on land might have originally been enforced by violence, and possession thus gained be held with a strong hand (2 Comm. 148): it is only by special provision in the statutes of forcible entry and detainer, that a party deforced may have a writ of restitution. As regards chattels, the common law principle is unchanged. Though the defendant could not have defended himself against an action of trespass for the force, he certainly can defend himself against an action for the property.

HARVEY v. DEWOODY, SUPREME COURT OF ARKANSAS, 1856 (18 Ark. 252).

Hanly, J.: . . . The defense set up in the plea is a justification of the trespass complained of in the declaration. The facts upon which the justification is based are, in substance, that the town of Des Arc was, by an act of the Assembly of this State, approved 28th December, 1854, incorporated: that, by said act, the corporate powers of said town were vested in one mayor and four councilmen, to be chosen in a certain manner — that five of the defendants were elected under the provisions of said charter, one as mayor, and the other four as councilmen — that at the same election, the remaining defendant, Robinson, was elected and chosen constable of said town: all strictly in conformity with the provisions of the act of incorporation — that all qualified in their respective offices, and entered upon the discharge of the duties thereof — that, at a certain time named, it was ascertained that a certain tenement or house situate in said town, owned by the plaintiff, had become a common or public nuisance, by endangering the property and health of many of the good citizens of said town by its exposed condition, and liability to take fire, and because of the fact of its being used by the public as a privy, etc. — that it was thought by them, in their official capacity, that the public health and security to property in said town required and demanded that said house or tenement should be declared a public nuisance, and be abated as such — that with this view they aver that on a certain day and time in said plea named and stated, they met in their corporate capacity, as by law they had a right to do, and passed an ordinance declaring said house or tenement of the plaintiff a public nuisance, and providing for its abatement by requiring the constable of said town, the defendant Robinson, to notify the plaintiff of the

proceedings of the defendants as mayor and council of said town, touching said house or tenement, and inform him that should he not within thirty days next thereafter abate said nuisance by removing the cause thereof, that they in their official capacity, as mayor, council and constable, would abate the same by tearing down such house or tenement — that said defendant Robinson, as such constable, gave the required notice under said ordinance to said plaintiff — that more than thirty days elapsed after such notice was so given, and the cause of said nuisance being still unremoved or abated by said plaintiff, under the provisions of said ordinance the said defendant Robinson as constable proceeded to and did pull down and destroy said house or tenement, as the only means of abating said nuisance, and the plea avers that this is the same trespass of which the plaintiff complains in his declaration.

Under this state of facts, which are admitted on the record, it may not be unprofitable, by way of illustrating our views, to announce a few principles of law, which we regard as involved in this cause.

A nuisance, in its common acceptation, means, literally, annoyance. In law its signification is more restricted. According to Blackstone, it means or signifies, "anything that worketh hurt, inconvenience or damage." See 3 Blacks. Com. 216.

Nuisances are of two kinds: — common or public, and private. See Bac. Abr. 146.

The first class is defined to be such an inconvenience or troublesome offense as annoys the whole community, in general, and not merely some particular person. See 1 Hawk. P. C. 187; 4 Blacks. Com. 166–7. It is said to be difficult to define what degree of annoyance is necessary to constitute a nuisance. In relation to trades, it seems that when a trade renders the enjoyment of life or property uncomfortable, it becomes a nuisance for the reason, that the neighborhood have a right to have pure and fresh air. See 1 Burr. 333. 2 Car. & P. 485; 2 Lord Raym. 1163. 1 Str. 686.

The second class, or private nuisances, is anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. See 3 Blacks. Com. 215. 5 Bac. Abr. 146.

For a common or public nuisance, the usual remedy at law is by indictment. For a private nuisance the ordinary remedy at law, is case. See 3 Blacks. Com. C. 13; 10 Mass. R. 72; 7 Pick. 76; 3 Harr. & McH. 441.

Courts of chancery exercise jurisdiction both as to common or public, and private nuisances, by restraining persons from setting them up, by inhibiting their continuance, or compelling their abatement. See 2 Story's Eq., sec. 924, p. 260.

As we have said, both courts of law and equity afford ample redress, and sufficiently prompt remedies in case of nuisances. But it seems the law is not satisfied with these, as affording full protection to the public or citizen, in many cases, for it is generally conceded that any person may abate a public nuisance. See 2 Salk. 458. 5 Bac. Abr. 152. 3 *Id.* 498. And it seems that this right extends as well to private as to common or public nuisances. See 5 Bac. Abr. *ubi sup.* 2 Bouv. Law. Dic., 3–2, p. 18. 2 Barn. & Cress. 311. 3 Dowl. & R. 556.

A public nuisance may be abated without notice (2 Salk. 458): and so may a private nuisance, which arises by an act of commission. And where the security of lives or property may require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it, an individual would be justified in abating a nuisance from omission without notice. 2 Barn. & Cress. 311. 3 Dowl. & R. 556, as above.

As to private nuisances, it has been held, that if a man in his own soil erect a thing which is a nuisance to another, the party injured may enter the soil of the other and abate the nuisance, and justify the trespass. See 9 Mass. R. 316. 4 Conn. 418. 5 *Id.* 210. 4 N. H. R. 527.

Distress for rent has been greatly modified or abolished by statute in most American jurisdictions. Distress of cattle damage feasant has also been modified or regulated by statutes (commonly known as the Herd Law in many jurisdictions), but is generally permitted.

Entry and Seizure are now obsolete.

BLACKSTONE, COMMENTARIES, III, 18.

The remedies for private wrongs which are effected by the mere operation of the law will fall within a very narrow compass; there being only two instances of this sort that at present occur to my recollection: the one that of retainer, where a creditor is made executor or administrator, to his debtor; the other in the case of what the law calls a remitter.

I. If a person indebted to another makes his creditor or debtee his executor, or if such a creditor obtains letters of administration to his debtor; in these cases the law gives him a remedy for his

debt by allowing him to retain so much as will pay himself, before any other creditors whose debts are of equal degree. This is a remedy by the mere act of law, and grounded upon this reason: that the executor cannot, without an apparent absurdity, commence a suit against himself, as a representative of the deceased, to recover that which is due to him in his own private capacity: but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides. For though a ratable payment of all the debts of the deceased, in equal degree, is clearly the most equitable method, yet, as every scheme for a proportionable distribution of the assets among all the creditors hath been hitherto found to be impracticable, and productive of more mischiefs than it would remedy, so that the creditor who first commences his suit is entitled to a preference in payment; it follows that, as the executor can commence no suit, he must be paid the last of any, and of course must lose his debt, in case the estate of his testator is insolvent, unless he be allowed to retain it. The doctrine of retainer is therefore the necessary consequence of that other doctrine of the law, the priority of such creditor who first commences his action. But the executor shall not retain his own debt, in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor and recovered his debt; which he never could be supposed to have done while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion. Nor shall an executor of his own wrong be in any case permitted to retain.

II. Remitter is where he who hath the true property or *jus proprietatis* in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent, and of course defective, title; in this case he is remitted, or sent back by operation of law, to his ancient and more certain title. The right of entry, which he hath gained by a bad title, shall be *ipso facto* annexed to his own inherent good one: and his defeasible estate shall be utterly defeated, and annulled, by the instantaneous act of law, without his participation or consent. As if A. disseizes B., that is, turns him out of possession, and dies, leaving a son C.; hereby the

estate descends to C., the son of A., and B. is barred from entering thereon till he proves his right in an action; now, if afterwards C., the heir of the disseizor, makes a lease for life to D., with remainder to B., the disseizee for life, and D. dies; hereby the remainder accrues to B., the disseizee: who, thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law remitted, or in of his former and surer estate. For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right. Therefore it is to be observed, that to every remitter there are regularly these incidents: an ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be cast upon the tenant, not gained by his own act or folly. The reason given by Littleton, why this remedy, which operates silently, and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy. For, as he himself is the person in possession of the freehold, there is no other person against whom he can bring an action, to establish his prior right. And for this cause the law doth adjudge him in by remitter; that is, in such plight as if he had lawfully recovered the same land by suit. For, as lord Bacon observes, the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse. *Nam quod remedio destituitur, ipsa re valet, si culpa absit.* But there shall be no remitter to a right for which the party has no remedy by action: as if the issue in tail be barred by the fine or warranty of his ancestors, and the freehold is afterwards cast upon him, he shall not be remitted to his estate-tail: for the operation of the remitter is exactly the same, after the union of the two rights, as that of a real action would have been before it. As therefore the issue in tail could not by any action have recovered his ancient estate, he shall not recover it by remitter.

And thus much for these extrajudicial remedies, as well for real as personal injuries, which are furnished or permitted by the law, where the parties are so peculiarly circumstanced as not to make it

eligible or in some cases even possible, to apply for redress in the usual and ordinary methods to the courts of public justice.

Remitter is now obsolete.

2. COURTS IN GENERAL[1]

BLACKSTONE, COMMENTARIES, III, 22.

The next, and principal, object of our inquiries is the redress of injuries by suit in courts: wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although, in the several cases of redress by the act of the parties mentioned in a former chapter, the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice: but it is only an additional weapon put into the hands of certain persons in particular instances, where natural equity or the peculiar circumstances of their situation required a more expeditious remedy than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from an action of trover or detinue: I may either enter on the lands on which I have a right of entry or may demand possession by a real action; I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action of debt, at my own option: if I do not distrain my neighbor's cattle damage-feasant, I may compel him by action of trespass to make me a fair satisfaction: if a heriot, or a deodand, be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, most indisputably suppose a previous right of obtaining redress some other way; which is given up by such agreement. But as to remedies by the mere operation of law,

[1] On the organization of courts in America, see Baldwin, The American Judiciary, Chaps. VIII and IX.

those are indeed given, because no remedy can be ministered by suit or action, without running into the palpable absurdity of a man's bringing action against himself; the two cases wherein they happen being such wherein the only possible legal remedy would be directed against the very person himself who seeks relief.

In all other cases it is a general and indisputable rule, that where there is a legal right there is also a legal remedy, by suit or action at law, whenever that right is invaded. And in treating of these remedies by suit in courts, I shall pursue the following method: first, I shall consider the nature and several species of courts of justice; and, secondly, I shall point out in which of these courts, and in what manner, the proper remedy may be had for any private injury; or, in other words, what injuries are cognizable, and how redressed, in each respective species of courts.

First, then, of courts of justice. And herein we will consider, first, their nature and incidents in general; and then, the several species of them, erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered. And, as by our excellent constitution the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice which are the medium by which he administers the laws, are derived from the power of the crown. For, whether created by act of parliament, or letters-patent, or subsisting by prescription, (the only methods by which any court of judicature can exist,) the king's consent in the two former is expressly, and in the latter impliedly, given. In all these courts the king is supposed in contemplation of law to be always present; but, as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective places: and I shall therefore here only mention one distinction, that runs throughout them all, viz., that some of them are courts of record, others not of record. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court and are of such high

and supereminent authority that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection, whether there be any such record or no; else there would be no end of disputes. But, if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man; whom the law will not entrust with any discretionary power over the fortune or liberty of his fellow subjects. Such are the courts-baron incident to every manor, and other inferior jurisdictions: where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law, unless under the value of 40s., nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.

In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex:* the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officer to apply, the remedy. It is also usual in the superior courts to have attorneys, and advocates or counsel, as assistants.[1]

An attorney at law answers to the procurator, or proctor, of the civilians and canonists. And he is one who is put in the place, stead, or turn of another, to manage his matters of law. Formerly every suitor was obliged to appear in person, to prosecute or defend his suit (according to the old Gothic constitution) unless by special license under the king's letters-patent. This is still the law in criminal cases. And an idiot cannot to this day appear by attorney, but in person; for he hath not discretion to enable him to

[1] On the profession of advocate or counsellor, reference may be made to Forsyth, Hortensius, or the Advocate.

appoint a proper substitute: and upon his being brought before the court in so defenseless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest. But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed, quia hoc non minimam incommoditatem habebat, coeperunt homines per procuratores litigare,*" so with us, upon the same principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute Westm. 3, c. 10, that attorney may be made to prosecute or defend any action in the absence of the parties to the suit. These attorneys are now formed into a regular corps; they are admitted to the execution of their office by the superior courts of Westminster Hall, and are in all points officers of the respective courts of which they are admitted; and, as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts, but such as is admitted and sworn an attorney of that particular court: an attorney of the court of king's bench cannot practise in the court of common pleas; nor *vice versa*. To practise in the court of chancery it is also necessary to be admitted a solicitor therein: and by the statute 22 Geo. II., c. 40, no person shall act as an attorney at the court of quarter-sessions but such as has been regularly admitted in some superior court of record. So early as the statute 4 Henry IV. c. 18, it was enacted, that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes have laid them under further regulations.

Of advocates, or (as we generally call them) counsel, there are two species or degrees: barristers, and serjeants.[1] The former are admitted after a considerable period of study, or at least standing, in the inns of court; and are in our old books styled apprentices, *apprenticii ad legem*, being looked upon as merely learners, and not qualified to execute the full office of an advocate till they were sixteen years standing, at which time, according to Fortesque, they might be called to the state and degree of serjeants, or *servientes ad legem*. How ancient and honorable this state and degree is, with the form, splendor, and profits attending it, hath been so fully displayed by many learned writers, that it need not be here enlarged

[1] See Pulling, The Order of the Coif.

on. I shall only observe, that serjeants at law are bound by a solemn oath to do their duty to their clients: and that by custom the judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench; the original of which was probably to qualify the puisne barons of the exchequer to become justices of assize, according to the exigence of the statute of 14 Edw. III. c. 16. From both these degrees some are usually selected to be his majesty's counsel learned in the law; the two principal of whom are called his attorney and solicitor-general. The first king's counsel under the degree of serjeant was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee; so that the first of the modern order (who are now the sworn servants of the crown, with a standing salary) seems to have been Sir Francis North, afterwards lord-keeper of the great seal to king Charles II. These king's counsel answer, in some measure, to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against the crown without special license; in which restriction they agree with the advocates of the fisc: but in the imperial law the prohibition was carried still further, and perhaps was more for the dignity of the sovereign; for, excepting some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject. A custom has of late years prevailed of granting letters-patent of precedence to such barrister as the crown thinks proper to honor with that mark of distinction: whereby they are entitled to such rank and preaudience as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These (as well as the queen's attorney and solicitor-general) rank promiscuously with the king's counsel and together with them sit within the bar of the respective courts; but receive no salaries, and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately (except in the court of common pleas, where only serjeants are admitted) may take upon them the protection and defense of any suitors, whether plaintiff or defendant; who are therefore called their clients, like the dependents upon the ancient Roman orators. Those indeed practised *gratis*, for honor merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, not as *locatio vel conductio*, but as *quiddam honorarium;*

not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation: as is also laid down with regard to advocates in the civil law, whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80 *l* of English money. And, in order to encourage due freedom of speech in the lawful defense of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men (a few of whom may sometimes insinuate themselves even into the most honorable professions) it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured. And counsel guilty of deceit or collusion are punishable by the statute Westm. 1, 3 Edw. I, c. 28, with imprisonment for a year and a day, and perpetual silence in the courts; a punishment still sometimes inflicted for gross misdemeanors in practice.

The strict and correct designations of members of the legal profession are:

Counsel (Counsellor at Law), when before the court trying a cause, arguing matter of law, or applying for orders.

Attorney at Law, in actions at or courts of law.

Solicitor in Chancery, in suits in or courts of equity.

Proctor, in proceedings in or courts of admiralty.

In England, the profession is divided into two branches, counsel being called Barristers, and, in recent times, the other branch of the profession, Solicitors.

In the United States all members of the profession are both attorneys and counsellors; but the term Solicitor is frequently used where there are separate courts of equity and in the federal courts.[1]

VON SCHMIDT v. WILBER, SUPREME COURT OF CALIFORNIA, 1893 (99 Cal. 511).

Harrison, J.: . . . A court is a tribunal presided over by one or more judges, for the exercise of such judicial power, as has been conferred upon it by law. Blackstone, following Coke, defines it as "a place where justice is judicially administered," (3 Bl. Comm. 23); but it is also essential that this place be designated by law, and

[1] On the history of the legal profession in the United States, reference may be made to Warren, History of the American Bar.

that the person or persons who are authorized to administer justice be at that place for the purpose of administering justice at such times as may be also designated by law. The times fixed by law for the transaction of judicial business are called "terms," and the periods between the end of one term and the beginning of the next are called "vacations." These "terms" vary in different jurisdictions according to the statutes by which they are fixed; in some states ending at fixed dates, and in others continuing until the commencement of a succeeding term. Formerly, in England, there were four terms of court in each year, and their duration was so fixed that there were only 91 days in each year during which the courts could be in session. As the judicial business increased, it became impossible to transact it all within these periods of time, and there grew up the practice of hearing many matters "out of court" with the same effect as if heard while the court was in session; but the matters which were thus heard were only such as pertained to causes pending in court, and which were of a nature to expedite or facilitate the judicial disposition of the pending cause, to which they were merely subsidiary or collateral. At a later day the practice arose of hearing and disposing of such matters at certain hours during "term time" while the court was not in formal session, and subsequently certain hours of each day were fixed, at which one of the judges would hear these matters while the court was actually in session. The motions and orders thus made were said to be heard and disposed of "at chambers," for the reason that they were heard by the judge at his chambers, rather than in the court room, but the term "chambers" finally became extended so as to include any place, either in or out of the court room, at which a judge may hear applications or make orders while the court is not in session, in matters pending in that court. The distinction between those matters which could be heard in court and those which could be heard at chambers arose from convenience, rather than from any other cause, but they were limited to the subsidiary and incidental steps in practice and procedure, leaving to the Court the judicial determination of the issues presented by the pleadings, and which formed a part of the record. The term "court," as used in the Code of Civil Procedure, means sometimes the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and in many cases is used synonymously, as well as interchangeably, with "judge"; and whether the act is to be performed by the one or the

other is generally to be determined by the character of the act, rather than by such designation. Section 166 provides that a judge "may, at chambers, grant all orders and writs which are usually granted in the first instance, upon an *ex parte* application"; and section 1004 provides that orders made out of court may be made by the judge of the court in any part of the state. Prior to the adoption of the present constitution there were fixed terms in this state for the transaction of judicial business by the several district courts, and any act done by a court after its term had ended was void. *Bates* v. *Gage*, 40 Cal. 183. Upon the adoption of the present constitution, all terms of court were abolished, and by its provisions (article 6, 5) the superior courts are always open, and (section 6) in San Francisco there may be as many sessions of said court at the same time as there are judges thereof; and "the judgments, orders and proceedings of any session of the superior court, held by any one or more of the judges of said courts respectively, shall be equally effectual as if all the judges of said respective courts presided at such session." Under the present constitution of this state, therefore, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts may be considered as the acts of the court of which he is a judge.

BLACKSTONE, COMMENTARIES, III, 275.

These terms are supposed by Mr. Selden to have been instituted by William the Conqueror; but Sir Henry Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the church; being indeed no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens, who were extremely superstitious in the observation of their *dies fasti et nefasti*, went into a contrary extreme and administered justice upon all days alike, till at length the church interposed and exempted certain holy seasons from being profaned by the tumult of forensic litigations. As, particularly, the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third;

and the long vacation between Midsummer and Michaelmas, which was allowed for the hay-time and harvest. All Sundays also, and some particular festivals, as the days of the purification, ascension, and some others, were included in the same prohibition; which was established by a canon of the church, A. D. 517; and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code.

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law-terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of King Edward the Confessor, that from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays till Monday morning, the peace of God and of holy church shall be kept throughout all the kingdom. And so extravagant was afterwards the regard that was paid to these holy times, that though the author of the Mirror mentions only one vacation of any considerable length, containing the months of August and September, yet Britton is express, that in the reign of King Edward the First no secular plea could be held, nor any man sworn on the Evangelists, in the times of Advent, Lent, Pentecost, harvest, and vintage, the days of the great litanies, and all solemn festivals. But he adds, that the bishops did nevertheless grant dispensations, (of which many are preserved in Rymer's *Fœdera*), that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by statute Westm. 1, 3 Edw. I. c. 51, which declares, that "by the assent of all the prelates, assizes of novel disseisin, mort d'ancestor and darrein presentment shall be taken in Advent, Septuagesima, and Lent; and that at the special request of the king to the bishops." The portions of time, that were not included within these prohibited seasons, fell naturally into a fourfold division, and, from some festival day that immediately preceded their commencement, were denominated the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael: which terms have been since regulated and abbreviated by several acts of parliament.

In England, Hilary Term began January 3, and ended February 12; Easter Term began the second Wednesday after Easter Sunday and ended the Monday after Ascension Day; Trinity Term began the Friday after Trinity Sunday,

and ended the second Wednesday thereafter; Michaelmas Term began October 9, and ended November 28. The Judicature Act of 1873 abolished these terms.

In this country, in most jurisdictions, the terms of court are provided for by statute. In a few jurisdictions terms have been done away with.

HOBART v. HOBART, SUPREME COURT OF IOWA, 1877 (45 Ia. 501).

Beck, J.: . . . III. Code, sec. 2222, authorizing and governing proceedings for divorce, contains the following provision: "No divorce shall be granted on the testimony of the plaintiff; and all such actions shall be heard in open court on the testimony of witnesses, or depositions taken as in other equitable actions triable upon oral testimony, or by a commissioner appointed by the court." The trial required in this section is to be had in open court. We are first charged with the task of determining the purport and effect of the words "open court." The language is simple and its meaning obvious. The trial must be in a court. Blackstone, adopting Coke's definition, says, "a court is a place where justice is judicially administered." 3 Bl. Com. 24. But this definition obviously wants fullness; it is limited to the place of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law. The Circuit Court is to be held by the Circuit Judge (Code, chap. 5, Title III), and its terms are prescribed by law (§ 163). The places of holding it are also prescribed, and it cannot be held elsewhere (§ 192). To constitute the Circuit Court, then, the Circuit Judge must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court.

FLOURNOY v. CITY OF JEFFERSONVILLE, SUPREME COURT OF INDIANA, 1861 (17 Ind. 169).

Perkins, J.: . . . The provision is not unconstitutional because it imposes upon a ministerial officer the performance of a judicial act.

The issuing of the writ, as we have said, is a ministerial act, as much as the issuing of an attachment, or *capias* for the arrest of the body, upon an affidavit.

Judicial acts, within the meaning of the Constitution of Indiana, are such as are performed in the exercise of judicial power. But the judicial power of this state is vested in courts. A judicial act then, must be an act performed by a court, touching the rights of parties, or property, brought before it by voluntary appearance, or by the prior action of ministerial officers, in short, by ministerial acts. See *Waldo* v. *Wallace*, 12 Ind. 569, where the constitutional provisions are quoted. The acts done out of court, in bringing parties into court, are, as a general proposition, ministerial acts; those done by the court in session, in adjudicating between parties, or upon the rights of one in court, *ex parte*, are judicial acts. 3 Blacks. Comm., p. 25.

And the act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act. In *Betts* v. *Dimon*, 3 Conn. 107, where it was held that the administration of the poor debtor's oath was a ministerial, not a judicial act, Hosmer, C. J., in delivering the opinion of the Court said: "Every selectman, before the appointment of an overseer, and every sheriff, previous to taking bail, makes inquiry to aid him in the legal performance of his duty."

So in *Crane* v. *Camp*, 12 Conn. 463, it was held that a justice of the peace acted ministerially in appointing freeholders to assess damages sustained by taking land for a public highway, though it was necessary for him to make inquiry as to the fitness of the persons appointed.

A ministerial act may, perhaps, be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.

With respect to the scope of their jurisdiction, courts are (1) of general jurisdiction, or (2) of special or limited jurisdiction. The former are usually called superior courts, the name borne by the three common-law courts to which they are analogous.

Courts are also (1) of original jurisdiction, or (2) of appellate jurisdiction. A court's jurisdiction is original when causes, or a certain class of causes, are brought there in the first instance; it is appellate when, having originated in some other court, they are brought to the court in question to obtain review of the order or judgment entered.

Courts are often given both kinds of jurisdiction. Thus, the Supreme Court of the United States has original jurisdiction of controversies between states of the Union, though its jurisdiction is chiefly appellate.

Jurisdiction may be, also, (1) exclusive or (2) concurrent. The jurisdiction of a court is exclusive when controversies, or a class of controversies, must be taken before the court in question, and nowhere else; it is concurrent when they may be taken before the court in question or some other tribunal at the election of the parties plaintiff. Thus, the United States District Courts and the superior courts of general jurisdiction in each state have concurrent jurisdiction of actions at law or suits in equity in which a federal question is involved or there is a diversity of citizenship, the parties on the one side being residents of the state and those on the other side residents of some other state or states.

GRIGNON v. ASTOR, SUPREME COURT OF THE UNITED STATES, 1844 (2 How. 319)

Baldwin, J.: . . . The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. (6 Peters, 729). A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original general jurisdiction, over any particular subjects; they are not courts of special or limited jurisdiction, they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to "courts of special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction"; that of the courts of the United States is limited and special, and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded. (3 Peters, 205.) They have power to render final judgments and decrees which bind the persons and things before them conclusively, in criminal as well as civil causes, unless revised on error or by appeal. The true line of distinction between courts whose decisions are conclusive if not removed to an appellate court, and those whose

proceedings are nullities if their jurisdiction does not appear on their face, is this: a court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities. The Circuit Court of this district has original, exclusive, and final jurisdiction in criminal cases; its judgment is a sufficient cause on a return to a writ of *habeas corpus;* "on this writ this court cannot look behind the judgment and re-examine the charges on which it was rendered. A judgment in its nature concludes the subject in which it is rendered, and pronounces the law of the case. The judgment of a court of record, whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive in this court as it is in other courts. It puts an end to all inquiry into the fact by deciding it." (3 Peters, 204, 205.)

OSGOOD v. BLACKMORE, SUPREME COURT OF ILLINOIS, 1871 (59 Ill. 261).

Walker, J.: . . . Had this been a confession before the clerk, and not in open court then there would have been great force in the objection. But where a court of superior general jurisdiction has proceeded to adjudicate and to decree in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. But when the court is of limited or inferior jurisdiction, such intendments will not be indulged, but the facts necessary to confer jurisdiction must appear in the proceedings.

This being the presumption, then, the court being of general and superior jurisdiction, and being in session when this judgment was rendered, we must presume that the court first heard evidence that the requisite notice was given to render the note due and payable, before the judgment was rendered. The presumption which the law indulges in favor of its jurisdiction can only be overcome, in a collateral proceeding, when the record itself shows there was no

jurisdiction, and there is nothing in the record of the confession in this case which tends in the slightest degree to contradict the presumption. Had the record stated that no proof was heard as to any notice having been given, then the presumption would have been rebutted. Or had it appeared from the record that the note was not, and could not have been due, then the record would have shown that the attorney in fact had no power to enter the appearance of the defendants, and having no power, the court would have failed to acquire jurisdiction of the persons of the defendants, and the case would have been like *Chase* v. *Dana, supra.* But to render this note payable, an act had to be performed that must be proved before a recovery could be had, and we must presume in favor of the judgment of the superior court, that evidence was heard that the notice had been given to render the note due, and which conferred jurisdiction over the defendants.

FOX v. HOYT, SUPREME COURT OF ERRORS OF CONNECTICUT, 1838 (12 Conn. 491).

Church, J.: . . . Two causes of error are assigned as apparent upon this record: First, that it does not appear that Justice Adams gave notice to the parties, in writing, to appear before him for the trial of said action, on the 20th day of January; nor that the notice was served, either by reading, or leaving a copy with the parties, in conformity with the provisions of the statute of 1833. And secondly, that it does not appear that Justice Adams found or adjudged any debt to be due to the plaintiff.

1. The statute of 1833, in addition to the act for regulating courts, etc., enacts, "that whenever any writ, suit, or civil process shall be made returnable before any justice of the peace, and at the time appointed for the trial of the same, said justice shall be absent from the town where the trial is to be had, said justice may, at any time within twenty days after the said time for trial, proceed to try said cause, in the same manner as he might have done at said time named for trial: Provided, that he shall give six days previous notice of the time and place of said trial, to the parties in said cause, in writing, to be read in hearing of said parties, or a true and attested copy thereof to be left at their usual place of abode." Before the enactment of this law, if a justice of the peace was absent at the time of trial, no legal provision existed for the continuance of his power and jurisdiction over the action; and no further proceedings could be had in the suit.

That the justice in this case, after the return day of the writ, the 13th day of January, could proceed no further, unless he caused the parties to be notified in writing, in the manner prescribed by the statute, is not a matter for dispute and cannot be. But the question is, whether the facts necessary to constitute a legal notice, should have been detailed upon the record of the justice, and for want of this, the judgment be erroneous? Or was it enough that it was found and stated, by the justice, that "the parties were duly notified?"

This action, at its commencement, was clearly within the jurisdiction of the justice. The sum in demand, the process and the parties, were such as gave to him jurisdiction. And the fact that on the return day, the justice was absent from the town, did not take away his jurisdiction over the cause, which had been legally commenced. The statute sustained the powers of the court, preserved the action alive, authorized future proceedings, and directed the manner of them. The justice, therefore, having before him a cause, as it appeared from the face of the process and proceedings, of which he had jurisdiction, had, as a matter of course, jurisdiction over all interlocutory acts legally necessary to a final judgment. It would seem to follow from these premises, if they are true, that the finding of the justice, that the parties were duly notified, is conclusive evidence of its truth. The supreme court of the United States, in the case of *Vorhees v. The United States Bank*, 10 Peters 472, in discussing this subject, says: "There is no principle better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears. This rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from their initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated becomes a part of their record, which thenceforth proves itself, without referring to the evidence on which it has been adjudged."

If this doctrine is applicable to the present case, of which there can be no doubt, the consequence is irresistible, that the fact of notice having been adjudicated, must be taken to be true, without referring to the evidence upon which the adjudication was predicated. The justice, by his record, says, the parties were duly notified; by which is meant, that they were notified in the manner prescribed by law. This is the obvious meaning of the language used. This the justice had a right to enquire after, and

to find as an essential fact; and in doing so, he must be presumed to have acted right. This principle has been often recognized, even when applicable to tribunals of special and limited powers. *Service* v. *Heermance*, 1 Johns. Rep. 91. *Frary* v. *Dakin*, 7 Johns. Rep. 75.

It was claimed for the defendant, in the argument, that a justice's court in this state is one of special and limited jurisdiction, and could not justify its proceedings at all, unless upon the face of them every fact appeared, which was necessary to confer jurisdiction.

We are not persuaded that it is necessary for the determination of this case, that we should look after and decide the precise distinction between courts of general and courts of limited jurisdiction, or whether a justice's court be the one or the other. For if we are correct in the opinion already expressed, that Justice Adams in this case had jurisdiction from the commencement of this suit, which was not foregone, by his absence on the return day of the writ; then the principle which the defendant would derive from this claim has no application here.

If by a court of general jurisdiction is meant one of unlimited powers, then we have none such in this state; nor do we know of any elsewhere. And if by a court of limited jurisdiction is meant one whose powers are subordinate to some other court; then all but courts of dernier resort are of this character. Such is not the sense in which this subject has been understood, either in England or in this country. We think that a court of record, proceeding according to the common law of the land, and whose judgments may be revised by writ of error, is a court whose proceedings and judgments import verity, and, until reversed, will protect all who obey them; and in this respect, there is, in this state, no distinction between courts of justices of the peace, and the county and superior courts. In this sense, the courts of common pleas of New Jersey, Massachusetts, Vermont and Ohio, have been considered as courts of general jurisdiction.

Between all these courts and mere special tribunals, such as commissioners on insolvent estates, committees, military tribunals, and many others, which are not courts of record, and are established for some special, and perhaps temporary, purpose, there exists a very marked distinction in regard to the credit and sanction to which their proceedings are entitled, and the immunities, which may be claimed by themselves, and such as act under them.

TRADER V. MCKEE, SUPREME COURT OF ILLINOIS, 1839 (1 Scam. 558).

Lockwood, Justice, delivered the opinion of the Court:

This was originally an action commenced before a justice of the peace, and was brought by appeal into the Circuit Court of Cook county. It appears from the bill of exceptions taken in the cause, that the action was founded on several judgments obtained before a justice of the peace in the State of Indiana, by McKee, against Moses S. and Tegal Trader. The defendants below objected to the transcripts of the judgments rendered by the justice of the peace, as evidence in the cause; which objection the Court overruled, and received the transcripts in evidence, and gave judgment for the plaintiff below. Among other errors relied on is the following, to wit: That it does not appear, from the evidence offered, that the justice before whom the judgments purport to have been rendered had any jurisdiction over the persons of the defendants or over the subject-matter of said actions. The law is well settled, that in courts not of record, in order to justify their taking cognizance of a cause, their jurisdiction must affirmatively appear. In order to have received these transcripts in evidence, it was incumbent on the plaintiff to have shown, that by the laws of Indiana the justice of the peace had jurisdiction over the subject-matter upon which he attempted to adjudicate.

DENISON V. SMITH, SUPREME COURT OF MICHIGAN, 1876 (33 Mich. 155).

Campbell, J.: Smith sued Denison jointly with one Bush, upon contract, in the superior court of Grand Rapids. Suit was commenced by declaration, and the sheriff made return of service on both defendants in Kent county, and did not certify that either was served in Grand Rapids. Judgment was rendered by default, on the 10th of July, 1875. On the 19th of July, upon an *ex parte* motion, the sheriff was allowed to amend his return so as to show service on Bush in Grand Rapids before service was made on Denison. The errors assigned in this court are based upon the irregularity of the default, when no jurisdiction appeared.

The jurisdiction of the superior court is declared to extend to civil cases involving more than one hundred dollars, where service of declaration or process is made on one or all of the defendants within the city of Grand Rapids, or where the plaintiff resides in Grand Rapids and service is made on a defendant in Kent county.

L. 1875, p. 44, 13. It does not appear from the declaration that the plaintiff resides in Grand Rapids, and therefore the jurisdiction depended on the proper service of process on Bush.

The court in question, though having a large jurisdiction over causes of action, is a court of special and limited jurisdiction as to persons, and in all such cases jurisdiction must be shown, and cannot be presumed. In *Turrill* v. *Walker*, 4 Mich. R., 177, it was held a circuit court process could not be served without the county, in the absence of any statute authorizing it, and that court, though having general powers, could have no jurisdiction over persons not found where they could be lawfully served. A municipal court created for a city would be an anomaly, if it could send its process abroad for general purposes. The powers of the circuit courts to reach defendants beyond the county, is confined to cases where one, at least, is served within it. In the case of joint debtors the practice is governed by setion 5748 of the Compiled Laws. That section expressly contemplates a service at home on one or more defendants, before the plaintiff can sue out further process or deliver a declaration to be served beyond the county on the rest, and in the case of process it evidently requires a return of "not found" as a preliminary. The language, though not precise, contemplates some evidence of service on one as a foundation for a further writ, and the same provision allows the plaintiff to have his declaration and notice of rule to plead, which are a substitute for process, "served on the defendants not elsewhere served in any other county in this state." It was never intended that an absent defendant should be pursued until service was made and proved on the other within the jurisdiction. That is a condition precedent. A defendant has a right to know from the record whether he is subject to the jurisdiction; and where it depends on a previous service on some one else, that can only be shown by the return of service, or by appearance.

Neither can a court render judgment against a party who has not appeared, without some evidence of jurisdiction.

3. JURISDICTION

SHELDON V. NEWTON, SUPREME COURT OF OHIO, 1854 (3 Ohio St. 494).

Ranney, J.: . . . I. A settled axiom of the law furnishes the governing principles by which these proceedings are to be tested.

If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order can not be regarded as a nullity, and can not, therefore be collaterally impeached. On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct, and precisely certain, in point of form, its record may appear; its judgment is void to every intent, and for every purpose, and must be so declared by every court in which it is presented. In the one case, the court is invested with the power to determine the rights of the parties, and no irregularity or error in the execution of the power can prevent its judgment, while it stands unreversed, from disposing of such rights as fall within the legitimate scope of its adjudication; while in the other, its authority is wholly usurped, and its judgments and orders the exercise of arbitrary power under the forms, but without the sanction, of law. The power to hear and determine a cause is jurisdiction; and it is *coram judice* whenever a case is presented which brings this power into action. But before this power can be affirmed to exist it must be made to appear that the law has given the tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; and that such person or thing has been properly brought before the tribunal to answer the charge therein contained. When these appear, the jurisdiction has attached; the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force, and effect of the final judgment, when brought collaterally in question. *United States* v. *Arredondo*, 6 Pet. 709; *Rhode Island* v. *Massachusetts*, 12 Pet. 718.

We wholly dissent from the position taken in argument, that the jurisdiction of the court, or the effect of its final order, can be made to depend upon the records disclosing such a state of facts to have been shown in evidence, as to warrant the exercise of its authority. To adopt the language of the court, in answer to the same position, in *Voorhes* v. *The United States Bank*, 10 Pet. 473: "We can not hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority too well and long settled to be questioned." It was distinctly repudiated in the early case of *Ludlow's Heirs* v. *Johnston*, 3 Ohio, 560; and has been no less

positively denied in every subsequent case, including *Adams* v. *Jeffries*, 12 Ohio, 253. The tribunal in which these proceedings were had was a court of record, of general common-law and chancery jurisdiction; and while it is true that in the exercise of this particular authority, it may be regarded as a tribunal of special and limited powers prescribed by statute, it is still to be remembered, that it was the tribunal created by the constitution, with exclusive jurisdiction over probate and testamentary matters, and had no one single characteristic of those inferior courts and commissions, to which the rule insisted upon has been applied by the English and American courts. All its proceedings are recorded, and constitute records, in the highest sense of the term, importing absolute verity, not to be impugned by averment or proof to the contrary, and conclusively binding the parties, and all who stand in privity with them. The distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity; and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them. *McCormick* v. *Sullivant*, 10 Wheat. 199; *Griswold* v. *Sedwick*, 1 Wend. 131; *Baldwin* v. *Hale*, 17 Johns. 272; *Grignon's Lessee* v. *Astor*, 2 How. 341; 2 Binn. 255; 4 *Ib.* 187.

HUNT v. HUNT, COURT OF APPEALS OF NEW YORK, 1878 (72 N. Y. 217).

Folger, J.: . . . We come now to consider the question of the jurisdiction of the court.

It is plain that every state has the right to determine the status, or domestic and social condition of persons domiciled within its territory. *Strader* v. *Graham*, 10 How. (U. S.) 82; *Cheever* v. *Wilson*, 9 Wall. 108; *Barber* v. *Root*, 10 Mass. 260; *Kinnier* v. *Kinnier*, *supra*. So it is that every state may determine for itself for what causes that status may be changed or affected, and hence upon what grounds, based upon what acts or omissions of persons holding the relation to each other of marriage, they may be separated and that relation dissolved; and it may prescribe what legal proceedings shall be had to that end, and what courts of its sovereignty shall have jurisdiction of the matrimonial status and power to

adjudge a dissolution of that relation. All citizens of that state, domiciled within it and owing to it allegiance, are bound by the laws and regulations which it prescribes in that respect. When, without infringement of the constitution of the state, its statutes have conferred upon any of its courts the general power to act judicially upon the matrimonial status of its citizens, or of persons within its territorial limits, and to adjudge a dissolution of the relation of husband and wife; then, we take it, such court has jurisdiction of the subject-matter of divorce. A text-writer of repute says, that "it is the act or acts which constitute the cause of action," which "is the subject-matter in a suit for divorce." See 3 Am. Law. Reg. (N. S.) 206. And in *Holmes* v. *Holmes*, 4 Lans. 388, the learned and able judge who delivered the opinion of the court speaks of the acts relied upon to obtain a divorce as being the subject-matter. The definitions of lexicographers imply a broader scope to the phrase, a more general meaning. It is: "The cause; the object; the thing in dispute." Bouvier's Law Dict. "The matter or thought presented for consideration in some statement or discussion." Webster's Dict. Power given by law to a court, to adjudge divorces from the ties of matrimony, does give jurisdiction of the subject-matter of divorce. Though the proceedings before that court, from first to last of the testimony, in an application for divorce, should show that a state of facts does not exist which makes a legal cause for divorce, yet it cannot be said that the court has not jurisdiction of the subject-matter; that it has not power to entertain the proceeding, to hear the proofs and allegations, and to determine upon their sufficiency and legal effect. Then jurisdiction of the subject-matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. See *Groenvelt* v. *Burwell*, 1 Ld. Raym. 465, 467. A court may have jurisdiction of all actions in *assumpsit*, of that subject-matter. An action by A., in which judgment is demanded against B. as the indorser of a promissory note, falls within that jurisdiction. Such court may entertain and try the action, and give a valid and effectual judgment in it. Though it should appear in proof that there had never been presentment and demand, nor notice of non-payment, yet a judgment for A. against B., though against the facts, without the facts to sustain it, would not be void as rendered without jurisdiction. It would be erroneous and liable to reversal on review. Until reviewed and reversed, it would be valid and enforceable against B., and entitled

to credit when brought in play collaterally. If given by such a court in a sister state against one of whose person that court had jurisdiction, it would be a judgment which the courts of this state would be bound to credit and enforce. Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case, as in a criminal case — as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So that there is a more general meaning to the phrase, "subject-matter," in this connection, than power to act upon a particular state of facts. It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. A suitor for a judgment of divorce may come into any court of the state in which he is domiciled, which is empowered to entertain a suit therefor, and to give judgment between husband and wife of a dissolution of their married state. If he does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. It has power to give judgment that he has not made out a case. That judgment would be valid and effectual as to bind him thereafter, and to be *res adjudicata* as to him in another like attempt by him. If that court, however, should err, and give judgment that he had made out his case, jurisdiction remains in it so to do. The error is to be corrected in that very action. It may not be shown collaterally to avoid the judgment, while it stands unreversed, whether the judgment be availed of in the state of its rendition, or a sister state; granted always that there had been jurisdiction of the parties to it. The judgment is in such case, also, *res adjudicata* against the party cast in judgment. The relevancy of this discussion will appear when we come to consider more particularly some of the points made by the plaintiff. We conclude that jurisdiction of the subject-matter is the power lawfully conferred to deal with the general subject involved in the action.

RANEY v. MCRAE, SUPREME COURT OF GEORGIA, 1854 (14 Ga. 589).

Lumpkin, J.: . . . But it is further insisted that this judgment is a nullity for want of jurisdiction in the court to give it. And this exception is founded on the fact that the declaration does not aver that the defendants resided in Stewart county.

Parties cannot by consent, whether express or implied, confer jurisdiction over the subject-matter. Titles to land must be tried in the superior court, and in the county where they lie. But it is otherwise as to the person.. The provision in the constitution fixing the residence of the defendant as the place of trial guarantees a personal privilege, which may be waived.

MARSDEN v. SOPER, SUPREME COURT OF OHIO, 1860 (11 Ohio St. 503).

Brinkerhoff, J.: . . . The only question arising on the record, which we deem it worth while to notice, is the question whether the court of common pleas had jurisdiction of the persons of the defendants below, so as to authorize that court to take cognizance of, and to render a judgment in the case affecting their rights.

It will be noticed that the plaintiff in this judgment is not the payee of the note on which judgment is taken, but an indorsee; and that the warrant of attorney, under which judgment was confessed, purports to authorize such confession, "in favor of any holder of this obligation," after the same becomes due. But it was held, in broad and general terms, in the case of *Osborn* v. *Hawley*, 19 Ohio Rep., 130, that a warrant of attorney to confess judgment, attached to a note, and forming a part of the same instrument, is not negotiable, and when the note is transferred, becomes invalid and inoperative. It is true the report of that case does not inform us whether the warrant of attorney in that case purported to authorize the confession of a judgment in favor of the payee of the note alone, or whether its terms extended, as in this case, to any holder of the note after due. But, however this may have been in that case, we suppose that, if this judgment rested upon the confession under the warrant of attorney alone, it would be very questionable whether the court of common pleas had any rightful jurisdiction of the defendants in the judgment.

But, did they not, after the entry of judgment against them, confer jurisdiction, by such an appearance and proceeding in the case, as constituted a waiver of exception to the jurisdiction? It

seems to us that they did. They were not obliged to proceed by motion, but might have resorted to proceedings in error, in the first instance. But they chose to appear and move to vacate the judgment. This they might properly do, either on the alleged ground of a want of jurisdiction, or alleged irregularity or error, outside of the question of jurisdiction. What was, in fact, the ground of the motion, we are not informed; for, by agreement of parties, no record of the motion was made. In this matter we are left to conjecture. If the motion was grounded upon irregularity, or error in the judgment alone, aside from the question of jurisdiction, the motion itself would constitute such an appearance as would have the effect to waive the question of jurisdiction. If the motion was based on an alleged want of jurisdiction, it would be no such appearance or waiver; and if the motion had been erroneously determined against the defendants in the judgment, they might have taken their exceptions, and reversed the ruling of the court. But, instead of doing this, while they were in the proper court, at a proper time, and while the whole matter was under the control of that court, they voluntarily consented to the dismissal of the motion, and, by so doing, it seems to us, they voluntarily consented to let the judgment stand against them, and ought not now to be allowed to allege a want of jurisdiction in the court which rendered it. Judgment affirmed.

THE LUCY, SUPREME COURT OF THE UNITED STATES, 1869 (8 Wall. 307).

Mr. Chief Justice Chase delivered the opinion of the court:

We think that the motion to dismiss, made in this case, must be allowed.

The decree of condemnation passed in the District Court on the 4th of August, 1862, and on the 15th an appeal was allowed to this court.

By the act of Feb. 23, 1847, 9 Stat. at L., 131, the District Court for the Northern District of Florida was established, with the jurisdiction and powers of a District and Circuit Court of the United States; and appeals were allowed from its decrees in the same manner and under the same regulations, as appeals from the circuit court.

At this time the act of 1803, 2 Stat. at L., 244, governed appeals from the District to the Circuit Courts, and from the Circuit Court to this court. No appeal in admiralty could be taken directly from

the District Court to this court, except when, as in the case of the Southern District Court of Florida, the District Court exercised the jurisdiction of the Circuit Court as well as that of the District Court.

If this state of the law had undergone no change at the date of the decree of condemnation in this case, the allowance of an appeal to this court would have been quite regular.

But on the 15th day of July, 1862, Congress passed an act establishing a Circuit Court for a circuit which included the Southern District of Florida, and repealing the former act, which conferred upon the District Court, Circuit Court jurisdiction. The effect of this act was to vest in the Circuit Court for that circuit the whole appellate jurisdiction exercised by other Circuit Courts in respect to decrees in admiralty. It left the original jurisdiction in admiralty of the District Court untouched.

It was in virtue of this original jurisdiction that the District Court had cognizance of the case of *The Lucy*. The appellate jurisdiction of the case was vested by the act in the Circuit Court.

It follows that, when the decree was pronounced in August, no appeal could be taken to this court, but only to the Circuit Court, and that the allowance of an appeal to this court was a nullity.

This objection to the jurisdiction is decisive; but, if it were otherwise, the fact that no transcript of the record was filed at the next term, would be fatal to the appeal. *Castro* v. *U. S.*, 3 Wall., 47; *Ins. Co.* v. *Mordecai*, 21 How., 195.

No consent of counsel can give jurisdiction. Appellate jurisdiction depends on the Constitution and the Acts of Congress. When these do not confer it, courts of the United States cannot exercise it.

We cannot take cognizance of a case not brought before us in conformity with the law.

The case at bar, therefore, must be dismissed.

DEWHURST v. COULTHARD, SUPREME COURT OF THE UNITED STATES, 1799 (3 Dal. 409).

The following statement of a case was presented by E. Tilghman to the court, at the instance of the attorneys for both the parties in the suit, in the circuit court of the New York district, with a request, that it might be considered and decided.

"This was an action commenced by Isaac Coulthard, against John Dewhurst in the Supreme Court of the state of New York, and was removed by petition to the circuit court of the United

States for the New York district, agreeably to the act of Congress in such case made and provided, by the defendant, he being a citizen of the state of Pennsylvania.

"The plaintiff's action is prosecution against the above defendant, as the indorser of a foreign bill of exchange drawn by G. B. Ewart of the city and state of New York, on Thomas Barnes of Baldork near London, dated the tenth day of January one thousand seven hundred and ninety-two.

"On the part of the defendant, it is admitted that at the time of the making and indorsing said bill, the said John Dewhurst was a citizen of, and resident in, the city and state of New York and that he duly received notice of the protest of the said bill, for non-acceptance and non-payment.

"That on or about the twenty-fifth day of May, one thousand seven hundred and ninety-two, the defendant removed to the city of Philadelphia, in the state of Pennyslvania, where he has resided since that period. That shortly after his removal to Philadelphia, viz., on or about the seventh day of June, one thousand seven hundred and ninety-two, a commission of bankruptcy was awarded and issued forth against him, in pursuance of two certain acts or statutes of the said state of Pennsylvania, the one entitled, 'An act for the regulation of bankruptcy'; the other entitled, 'An Act to amend an act entitled, an act for the regulation of bankruptcy.' And in pursuance of which said statutes the defendant did actually deliver, assign and transfer, to the commissioners appointed under the said commission, the whole of his effects, as well in the state of Pennsylvania as elsewhere, which consisted principally of credits due to the said defendant, in the state of New York. It is further admitted, that the said John Dewhurst in all things complied with the said statutes of bankruptcy before referred to, and that on the eleventh of August, one thousand seven hundred and ninety-two, he obtained a certificate of bankruptcy duly executed.

"Upon the above state of the case, it is submitted to the Supreme Court of the United States, to determine, whether the certificate, issued under the laws of Pennsylvania, operates as a discharge of the said debt, notwithstanding its being contracted in another state, where there was no bankrupt law, and while the defendant was resident in the said state of New York. If the court should be of opinion that it does, it is agreed that judgment be entered for the defendant; otherwise for the plaintiff, for eleven hundred and twenty dollars damages, and six cents costs."

The court, on the ensuing morning, returned the statement of the case, declaring, that they could not take cognizance of any suit or controversy which was not brought before them by the regular process of the law. Motion refused.

BLAIR v. STATE BANK OF ILLINOIS, SUPREME COURT OF MISSOURI, 1843 (8 Mo. 313).

Scott, J.: H. Raisin & Co. made an assignment of their effects, for the benefit of their creditors, to the appellant, Blair. The effects assigned were insufficient to pay all his debts. The appellee, the State Bank of Illinois, was the holder of two bills of exchange on Raisin & Co., the indorsers of which were preferred creditors under the assignment. Blair, the assignee, declared a dividend of the assets amongst the preferred creditors of twenty-five per cent upon their respective claims. The State Bank of Illinois having failed, its notes in circulation were forty-four per cent below par. An action of *assumpsit* was instituted by the Bank against Blair. The declaration contained the common counts, and the parties having agreed upon the foregoing statement of facts, they made the right of the plaintiff to recover dependent on the solution of the question, whether Blair, the assignee, could buy the notes of the State Bank of Illinois, and with them pay the dividend due the bank, carrying the profits arising from the transaction into the general fund, for distribution among the creditors at large. The court below rendered judgment for the bank, from which Blair has appealed to this Court.

If Blair wished to know whether the notes of the bank could have been used as a set-off to the action against him, we know of no other mode by which it could be ascertained, than by pleading them by way of set-off. But we cannot see the object in raising this question. Raisin & Co.'s effects were insufficient to pay all their debts. The agreed case admits that the indorsers of the bills of exchange were preferred creditors under the assignment; that is, we suppose, were to have the debts for which they were liable, paid before the other creditors. Now, if Blair should have purchased the paper of the bank, and with it have paid her dividend under the assignment, and carried the profits into the trust fund, would not these profits have rightly belonged to the bank, standing in the place of the preferred creditors? Twenty-five per cent of the amount of the bills of exchange, converted into bank-paper at forty-four per cent discount, would not have paid the bills, and until

the bank had been paid, at least in her own paper, she being a preferred creditor, a question as to the legality of the conversion of the funds into bank-paper could not well arise between her and the other creditors — that is, should not all the money accruing under the assignment be first applied to the satisfaction of the preferred creditors?

But be these matters as they may, we do not feel ourselves at liberty to entertain questions presented in the manner in which this is done. The parties to a suit at law or equity may agree on the facts of a case, and suffer the court to declare the law arising on those facts, but to agree on facts not in the cause, and under the pretense of a suit at law, to obtain the opinion of this court on matters wholly disconnected with the suit, cannot be tolerated. Here we are called upon in an action of *assumpsit*, to declare the law governing the conduct of a trustee in the management of the trust fund, a duty peculiarly the province of a court of equity, which, with unrestrained freedom, takes a whole transaction into consideration, from the beginning to the end, giving attention to every circumstance which can in any wise affect its opinion. The straight-laced proceedings of a court of law wholly disqualify it for such a task, and neither the consent nor the release of errors, nor any other act of the parties, can induce this court to permit itself to be converted into one in which questions of law may be mooted, at the will of suitors. Appeal dismissed.

BREWINGTON v. LOWE, SUPREME COURT OF INDIANA, 1848 (1 Ind. 21).

Smith, J.: The record in this case purports to contain the proceedings in an action of trespass *quare clausum fregit*, instituted in the Dearborn circuit court, by Joshua Brewington against George P. Lowe. The declaration contains five counts, the *locus in quo* specified in each count being different. The defendant pleads in abatement to the jurisdiction of the court, that the said several closes, in the first, second, and third counts mentioned are situate within the county of Ohio, and that the closes in the fourth and fifth counts mentioned are within the county of Ripley. The replications allege that all of said closes are in the county of Dearborn tendering issues to the country. The cause was then submitted to the court for trial, and there was a finding and judgment for the defendant.

By a bill of exceptions it appears that upon the trial the following facts were admitted: 1. That the closes described in the second

and third counts of the declaration are situate in that territory stricken or attempted to be stricken from Dearborn county to form and organize Ohio county by the act of the legislature of the fourth of January, 1844. 2. That the close described in the first count is situate in the territory stricken or attempted to be stricken from Dearborn county, and added or attempted to be added to Ohio county by the act of the seventh of January, 1845. 3. That the closes in the fourth and fifth counts mentioned are situate in that part of Dearborn county taken or attempted to be taken to form part of Ripley county by the act of December 27, 1816. It also appears that upon the trial the plaintiff offered certain testimony with a view of establishing the fact that, by the act of December 27, 1816, detaching a portion of the county of Dearborn for the formation of the county of Ripley, the former county was reduced so as to contain less than four hundred square miles of territory, and that consequently that act, as well as the subsequent acts forming the county of Ohio out of the territory then remaining to Dearborn county, were, so far as regarded the rights of the latter county, unconstitutional and void, and could not divest the courts of that county of the jurisdiction they had previously been authorized to exercise within the limits of the territory thus attempted to be detached. This testimony was excluded by the circuit court on the ground that it was not competent for the court to hear testimony, the object of which was to show that the several acts of the legislature, above referred to, were void by reason of their unconstitutionality.

In the history given of this case by the counsel for the plaintiff in error, and his statement is confirmed by the counsel for the defendant, we are informed that this suit was not instituted to settle any matter really in controversy between the nominal parties, but as a device by certain persons who believed "that the legislature had been imposed upon as to the quantity of land in Dearborn county," when the acts above referred to were passed, and were desirous to test the constitutionality of those acts by bringing them in question in some way before a judicial tribunal. These persons accordingly procured surveys to be made of the territory embraced within the counties of Dearborn and Ohio, and then instituted this action avowedly for the purpose of testing the constitutionality of the acts of the legislature forming the counties of Ripley and Ohio, by describing closes in the different counts of the declaration situate in each of the several pieces of territory

which had been taken by those acts from the county of Dearborn, and thus raising an issue as to the jurisdiction of the Dearborn circuit court within the territory thus detached. We think these proceedings were instituted under a mistaken apprehension of the proper functions of the judiciary. Courts of justice are established to try questions pertaining to the rights of individuals. An action is the form of a suit given by law for the recovery of that which is one's due, or a legal demand of one's right. In such actions, if there is found to be a conflict of laws as they relate to the particular case under consideration, whether such conflict arises from constitutional reasons or otherwise, there can be no doubt that, from the very nature of the case, a decision must be rendered according to the laws which are paramount. But courts will not go out of their proper sphere to determine the constitutionality or unconstitutionality of a law. They will not declare a law unconstitutional or void in the abstract, for that would be interfering with the legislative power, which is separate and distinct. It is only from the necessity of the case, when they are compelled to notice such law as bearing upon the rights of the parties to a question legally presented for adjudication that they will go into an examination of its validity, and then the decision has reference only to that particular question, except so far as it may operate as a precedent, when it may afterwards become necessary to decide similar cases.

But unless some individual right directly affecting the parties litigant is thus brought in question so that a judicial decision becomes necessary to settle the matters in controversy between them relative thereto, the courts have no jurisdiction; and it would be a perversion of the purposes for which they were instituted and an assumption of functions that do not belong to them, to undertake to settle abstract questions of law in whatever shape such questions may be presented. The impropriety of doing so in the present case is manifest from the facts, that the question professed to be litigated considered with reference either to the point of law attempted to be raised, or the importance of the interests involved is one of very grave character, and the parties who would be chiefly affected by its decision are not before the court, and have no opportunity of being heard. Indeed, it is well settled that courts will not take cognizance of fictitious suits instituted merely to obtain judicial opinions upon points of law: *Loughead* v. *Bartholomew*, Wright (Ohio), 90; *Hoover* v. *Hanna*, 3 Blackf. 48; *Bunn* v. *Riker*, 4 Johns. 434 (4 Am. Dec. 292); *Jones* v. *Randall*, Cowp. 37;

Da Costa v. *Jones*, *Id.* 729; *Allen* v. *Hearn*, 1 T. R. 56; *Atherfold* v. *Beard*, 2 *Id.* 610; *Newling* v. *Francis*, 3 *Id.* 697; *Egerton* v. *Furzeman*, 1 Car. & P. 613.

As we are distinctly informed by both parties that this is a fictitious suit, without inquiring into the grounds upon which the judgment was rendered, as it was for the defendant, and only for costs, the judgment below will be affirmed at the plaintiff's costs in this court.

The judgment is affirmed, with costs.

CONSTITUTION OF MASSACHUSETTS, Pt. II, c. iii, § 2.

Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the Supreme Judicial Court upon important questions of law and upon solemn occasions.[1]

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[1] On advisory opinions, see Thayer, Legal Essays, 42–59.

CHAPTER VI

THE COMMON-LAW ACTIONS[1]

So much of substantive law is, for historical reasons, bound up in procedure that it is highly important for the student to become acquainted at once with the more important common-law actions. Although these actions are now superseded by more simple and flexible forms of procedure, they have given rise to, or correspond to, important distinctions in the substance of the law, which are still of daily application.

The principal common law actions are ten: (1) Ejectment, (2) Detinue, (3) Replevin, (4) Debt, (5) Covenant, (6) Special *Assumpsit*, (7) General (*Indebitatus*) *Assumpsit*, (8) Trespass, (9) Trespass on the Case (Case), (10) Trover. This is the final form of these actions, after they had developed into a logical system. Historically, Ejectment, *Assumpsit*, Case, and Trover were developments out of Trespass, and *Assumpsit* and Trover were in form to the end actions of Trespass on the Case.

SCHEME OF THE COMMON-LAW ACTIONS.

1. To recover property.
   To recover real property, ... REAL ACTIONS
   The real actions are obsolete, except that the Writ of Entry is in use in Massachusetts, New Hampshire, and Maine.
2. To recover possession —
   Of real property, ... EJECTMENT
   Of personal property —
   acquired lawfully by the defendant, but subject to a superior right of immediate possession in the plaintiff, ... DETINUE
   taken by the defendant from the plaintiff, ... REPLEVIN
   Replevin, in this country, has almost entirely superseded detinue, and generally lies in all cases to recover possession of personal property.
3. To recover damages.
   (1) *Ex contractu.*
   To recover a liquidated sum of money, due upon specialty, record, statute, or simple contract, ... DEBT
   To recover damages for breach of a covenant, or promise under seal. COVENANT
   To recover damages for breach of a simple contract, (SPECIAL) ASSUMPSIT
   To recover damages upon *Quasi* Contract (no promise, but the case dealt with in law as if there had been one), . (GENERAL) ASSUMPSIT

[1] Maitland, Lectures on the Forms of Action at Common Law (published with his lectures on Equity).

SCHEME OF THE COMMON-LAW ACTIONS—(*continued*).

(2) *Ex delicto.*

To recover damages for a direct physical interference with the person or property, ... TRESPASS

Where the trespass consists in taking chattel property out of the plaintiff's possession, the action is called Trespass *de Bonis Asportatis*, or Trespass *de bonis.*

Where the trespass is committed upon real property, the action is called Trespass *Quare Clausum Fregit*, or Trespass *quare clausum.*

To recover damages for wrongful acts not within the scope of other actions (and not breaches of contract) which cause injury, without direct physical interference with person or property, (e.g., Libel, Slander, a Nuisance, Deceit), ... CASE

To recover damages for the conversion of chattels, ... TROVER

BLACKSTONE, COMMENTARIES, III, 117.

With us, in England, the several suits, or remedial instruments of justice are from the subject of them distinguished into three kinds: actions personal, real, and mixed.

Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs; and they are the same which the civil law calls "*actiones in personam, quae adversus eum intenduntur, qui ex contractu vel delicto obligatus est aliquid dare vel concedere.*" Of the former nature are all actions upon debt or promises; of the latter, all actions for trespasses, nuisances, assaults, defamatory words, and the like.

Real actions, (or, as they are called in the Mirror, feodal actions) which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process: a much more expeditious method of trying titles being since introduced, by other actions personal and mixed.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained. As, for instance, an action of waste: which is brought by him who hath the inheritance in remainder or reversion,

against the tenant for life who hath committed waste therein, to recover not only the land wasted, which would make it merely a real action; but also treble damages, in pursuance of the statute of Gloucester, which is a personal recompense; and so both, being joined together, denominate it a mixed action.

Extracts from POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, bk. II, chap. 9.

We have yet to speak of the most distinctively English trait of our medieval law, its "formulary system" of actions. We call it distinctively English; but it is also, in a certain sense, very Roman. While the other nations of western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history; it was developing a formulary system which in the ages that were coming would be the strongest bulwark against Romanism and sever our English law from all her sisters.

The phenomenon that is before us cannot be traced to any exceptional formalism in the procedure which prevailed in the England of the eleventh century. All ancient procedure is formal enough, and in all probability neither the victors nor the vanquished on the field at Hastings knew any one legal formula or legal formality that was not well known throughout many lands. No, the English peculiarity is this, that in the middle of the twelfth century, the old oral and traditional formalism is in part supplanted and in part reinforced by a new written and authoritative formalism for the like of which we shall look in vain elsewhere, unless we go back to a remote stage of Roman history. Our *legis actiones* give way to a formulary system. Our law passes under the dominion of a system of writs which flow from the royal chancery. What has made this possible is the exceptional vigor of the English kingship, or if we look at the other side of the facts, the exceptional malleableness of a thoroughly conquered and compactly united kingdom.

. . . . . .

The last years of Henry III.'s day we may regard as the golden age of the forms. We mean that this was the time in which the number of forms which were living and thriving was at its maximum. Very few of the writs that had as yet been invented had become obsolete, and, on the other hand, the common law's power

of producing new forms was almost exhausted. Bracton can still say, *Tot erunt formulæ actionum quot sunt formulæ brevium.* Only some slight power of varying the ancient formulas will be conceded to the Chancellor; all that goes beyond this must be done by statutes, and when Edward I. is dead, statutes will do little for our ordinary private law. The subsequent development of forms will consist almost entirely of modifications of a single action, namely Trespass, until at length it and its progeny — Ejectment, Case, *Assumpsit*, Trover—will have ousted nearly all the older actions. This process, if regarded from one point of view, represents a vigorous, though contorted, growth of our substantive law; but it is the decline and fall of the formulary system, for writs are being made to do work for which they were not originally intended, and that work they can do only by means of fictions.

Extracts from FITZHERBERT, NATURA BREVIUM. (Sir Anthony Fitzherbert was a justice of the Court of Common Pleas in the reign of Henry VIII.)

WRIT OF ASSISE OF NOVEL DISSEISIN. The King to the Sheriff &c. A hath complained to us that B unjustly and without judgment hath disseised him of his freehold in C after the first passage of our lord King Henry, son of King J., into Gascoigne; and therefore we command you, that if the aforesaid A shall make you secure to prosecute his claim, then cause that tenement to be seized, and the chattels which were taken in it, and the same tenement with the chattels to be in peace until the first assise, when our justices shall come into those parts, and in the meantime cause twelve free and lawful men of that venue to view that tenement and their names to be put into the writs, and summon them by good summoners, that they be before the justices aforesaid at the assise aforesaid ready to make recognizance thereupon, and put by gages and safe pledges the aforesaid B, or (if he shall not be found) his bailiff, that he may be then and there to hear that recognizance &c. And have there the summoners, the names of the pledges, and this writ &c.

WRIT OF EJECTIONE FIRMAE (EJECTMENT). A writ of *Ejectione Firmae* lieth, where a man doth lease lands for years &c., and afterwards the lessor doth eject him, or a stranger doth eject him of his term, the lessee shall have a writ of *Ejectione Firmae*; and the form of the writ is such:

The King to the Sheriff &c. If A shall make secure &c., then put &c. B that he be before our justices &c., to shew wherefore with force and arms he entered into the manor of E, which T demised to the said A for a term which is not yet passed, and the goods and chattels of him the said A to the value of &c., found in the same manor, took and carried away and ejected him, the said A, from his farm aforesaid, and other wrongs to him did, to the great damage of &c.

WRIT OF DEBT. A writ of debt properly lieth where a man oweth another a certain sum of money by obligation, or by bargain for a thing sold, or by contract, or upon a loan made by the creditor to the debtor, and the debtor will not pay the debt at the day appointed that he ought to pay it, then the creditor shall have an action of debt against him for the same; and it may be sued in the county before the sheriff by *justicies*, as well as in the Common Pleas; and the form of the writ is sometimes in the *debet* and *detinet*, and sometimes in the *detinet* only and not in the *debet* and if it be in the *debet* it shall abate. It shall always be in the *debet* and *detinet*, when he who makes the bargain or contract, or lends the money, or he to whom the bond is made, bringeth the action against him who is bounden, or party to the contract or bargain, or unto the lending of money. . . . But if a man sell twenty quarters of wheat or a horse; if he bring debt for the horse the writ shall be in the *detinet* only; and the form of the writ, sued in the county before the sheriff, for money, is such:

The King to the Sheriff of Surry, Greeting: We command you that you justice A that justly and without delay he render to B twenty shillings which he oweth to him as it is said, as he can reasonably show that he ought to render it to him, that we may hear no more clamor for want of justice &c. Witness &c.

And if the writ of debt be for other goods or chattels than money, then the writ of debt shall be such:

The King to the Sheriff &c. We command you that you justice A &c., that he render to B a certain book, or a certain cup, or a certain horse, or two lambs of the price of &c., which he unjustly detains from him &c.

And the form of the writ of debt in the Common Pleas is:

The King to the Sheriff &c. Command A that justly &c. he render to B one hundred shillings, which he owes to him and unjustly detains, as it is said: and unless he will do it, and if the said B shall

make you secure &c., then summon by good summoners the aforesaid A &c.

WRIT OF COVENANT. Writs of covenant are of divers natures; for some are merely personal, and some covenants are real; to have a real thing, as lands and tenements; as a covenant to levy a fine of land is a real covenant. But a writ of covenant which is more personal, is where a man by deed doth covenant with another to build him a house &c., or to serve him, or to infeoff him &c.; and he with whom the covenant was so made shall have a writ of covenant against him. And here is a note in the Register,[1] which is this: a writ of covenant ought not to be made according to law Merch. without a deed, because no plea of covenant can be without deed, and every man ought to be judged according to his deed, and not by another law; and the form of the writ is such:

The King to the Sheriff &c. Command A that &c. he keep his covenant with B &c., touching the damage and loss by the breach of trust and default of W, the son of R, apprentice of the aforesaid B, committed within six years to be restored to him the said B, and unless &c.

WRIT OF DETINUE. A writ of detinue in case lieth where a man delivereth goods or chattels unto another to keep, and afterwards he will not deliver them back again; then he shall have an action of detinue of those goods and chattels; and so if a man deliver goods or money put up in bags, or in a chest, or in a cupboard, unto another to keep, and he will not redeliver the goods or the money in the bags; he to whom they should be delivered shall have a writ of detinue for those goods &c. But if a man deliver money not in any bag or chest to redeliver back, or to deliver over unto a stranger; now he to whom the money should be delivered shall not have an action of detinue for the money, but a writ of account; because detinue ought to be for a thing which is certain; as of money in bags, or of a horse, or of a hundred cows, or such certain things. And this writ may be vicountiel and shall be sued before the sheriff in the County if the plaintiff please, or he may sue it in the Common Pleas; and the form of the writ in the Common Pleas is:

The King to the Sheriff &c. Command A &c. that &c. he render to B one charter which he unjustly detains from him, as he saith and unless &c.

[1] Register — *Registrum Brevium*, the register of original writs.

WRIT OF TRESPASS. There are two manners of writs of trespass: One is of a trespass which is vicountiel, and is directed unto the sheriff and is not returnable, but shall be determined in the county before the sheriff; and in this writ he shall not say *quare vi et armis* &c., but the form of the writ is such:

The King to the Sheriff of Lincolnshire, Greeting: W of B hath complained unto us, that C made an assault upon him the said W at N, and beat, wounded and ill treated him, and other enormous things to him did, to the no small damage and grievance of him the said W. And therefore we command you, that you hear that plaint, and afterwards justly cause him to be thereupon brought before you, that we may hear no more clamor thereupon for want of justice. Witness &c.

And by this writ the sheriff shall hear and determine the trespass, &c. by inquest according to the common law. . . . And so for every manner of trespass done, a man may chuse to have such a writ directed unto the sheriff, to end the matter before him in the county, or to sue a writ unto the sheriff returnable in the Common Pleas or the King's Bench.

And if the writ of trespass be returnable, then the writ shall be of another form, for then these words, *vi et armis* shall be in the writ; and if it want those words, the writ shall abate; if they be not writs of Trespass upon the Case; which writs of Trespass shall not have these words *quare vi et armis* in the writ, although they are returnable in the Common Pleas or King's Bench; and if they have the words *quare vi et armis* in the writs, it shall be good cause to abate the writs. And the form of a writ returnable in the King's Bench is such:

The King to the Sheriff &c. If A shall make you secure &c., then put by gages and safe pledges B that he be before us on the morrow of All Souls, wheresoever we shall then be in England (and if it be returnable in the Common Pleas, then thus; before our Justices at Westminster) to show wherefore with force and arms he made an assault upon the said A at N and beat and wounded and ill treated him, so that his life was despaired of, and other enormous things to him did, to the damage of him the said A and against our peace. And have there the names of the pledges and this writ. Witness &c.

WRIT OF TRESPASS ON THE CASE. There is another form of writ of trespass, upon the case, which is to be sued in the Common

Pleas or King's Bench; and in that writ he shall not say *vi et armis* &c., but in the end of the writ he shall say *contra pacem;* and the form is such:

The King to the Sheriff &c. If Maud of D &c., then put &c., that he be &c. to answer as well us as Maud wherefore, seeing that the same Maud lately in our court obtained our certain writ of prohibition against the aforesaid I that he should not prosecute any plea in the Court Christian touching chattels and debts, which do not concern testament or matrimony, and the said Maud delivered the said writ to the aforesaid I at C, he the said I, having received our said writ there, cast it into the dirt and trod it under his feet, and also hath prosecuted the plea aforesaid in the same Court Christian, in contempt of us, and to the great damage of the said Maud, and against our peace. And have &c.

Another Writ: Wherefore in the water of Plim, along which, between Humber and Gaunt, there is a common passage for ships and boats, he fixed piles across the water, whereby a certain ship, with thirty quarters of malt of him the said W was sunk under water, and twenty quarters of the malt, of the price of one hundred shillings perished, and other wrongs, &c.

STATUTE OF WESTMINSTER, II (13 Edward I., St. 1) (1285).

And whensoever from henceforth it shall fortune in the Chancery that in one case a writ is found, and in like case, falling under like law and requiring like remedy is found none, the clerks of the chancery shall agree in making the writ, or the plaintiffs may adjourn it until the next parliament, and let the cases be written in which they cannot agree, and let them refer themselves until the next parliament, by consent of men learned in the law, a writ shall be made, lest it might happen after that the court should long time fail to minister justice with complainants. (Translation of Cambridge Edition.)

Extracts from STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS (1824), 11, 14.

There are some peculiarities attached to the Action of Ejectment which require explanation. As a remedy for recovery of land, its history is as follows. At a very early period, that is, soon after the reign of Ed. III., real and mixed actions began gradually to fall into neglect, in consequence of their being more dilatory and intricate in their forms of proceeding than personal actions, and of their being cognizable only in the Court of Common Pleas.

In lieu of them, recourse was had to certain personal actions, which, though they did not claim the specific recovery of land (like those of the real and mixed classes), were yet attended with incidents that indirectly produced that benefit. Of these, the principal, and that which is alone retained in modern practice, was the action of ejectment — *ejectio firmae* — in which damages were claimed by a tenant for a term of years, complaining of forcible ejection or ouster from the land demised. In favor of this mode of remedy, the courts determined that the plaintiff was entitled not only to recover the damages claimed by the action, but should also, by way of collateral and additional relief, recover possession of the land itself for the term of years of which he had been ousted.

In consequence of the establishment of this doctrine, which gave ejectment an effect similar to that of a real or mixed action, claimants of land were led to have recourse to it, in lieu of those inconvenient remedies. Regularly, indeed, none could resort to this form of suit but those who had sustained ouster from a term of years, such being the shape of the complaint; but it was rendered much more extensive in its application, by the invention of a fictitious system of proceeding, which enabled claimants of land, in almost every instance, upon whatever title they relied (whether term of years or freehold), to bring their cases ostensibly within the scope of this remedy. This fictitious method, being favored and protected by the courts, passed into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property. Whenever the case is such that the claimant has in him the right of entry, the fiction on which an ejectment rests is held to be allowable. And as in every case of lawful claim to land, there is now a right of entry, unless the circumstances are such that an action of writ of right of dower, dower, or *quare impedit* is applicable, it follows that under all other circumstances an action of ejectment may be brought; and wherever it may be brought, it forms (since the late abolition of real and mixed actions in general) the only remedy.

Of personal actions, the most common are the following: Debt, Covenant, Detinue, Trespass, Trespass on the Case, and Replevin.

It is provided by the statute 2 Will. IV. c. 39, that personal actions in the superior courts shall be commenced by writ of summons, or writ of capias, in such forms as are given by the act — by summons where the defendant is not to be arrested — by capias where he is.

The Action of Debt lies where a party claims the recovery of a debt, *i.e.*, a liquidated or certain sum of money alleged to be due to him.

The form of Summons in Debt is as follows:

William the Fourth, &c., to C. D., of &c., in the county of ——, greeting. We command you (or as before or often, we have commanded you) that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of ——, in an action of debt at the suit of A. B. And take notice that in default of your so doing, the said A. B. may cause an appearance to be entered for you, and proceed therein to judgment and execution. Witness ——, at Westminster, the —— day of ——.

The form of Capias in Debt is as follows:

William the Fourth, &c., to the Sheriff ——, greeting. We command you (or as before or often, we have commanded you) that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of ——, if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you, according to law, in an action of debt at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And we hereby require the said C. D. to take notice that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of ——, to the said action, and that in default of his so doing, such proceedings may be had and taken as mentioned in the warning hereunder written, or indorsed hereon. And we do further command you, the said sheriff, that immediately after the execution hereof, you do return this writ to our said court together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner, if you shall be thereto required by order of the said court, or of any judge thereof. Witness ——, at Westminster, the —— day of ——.

The Action of Covenant lies where a party claims damages for a breach of covenant, *i.e.*, of a promise under seal.

The form of the Summons and Capias is similar to that in Debt (the name of the action only excepted).

The Action of Detinue lies where a party claims the specific recovery of goods and chattels or deeds and writings, detained from him. This remedy is in somewhat less frequent use than any of the other personal actions above enumerated. The form of the Summons and Capias is similar to that in Debt (the name of the action only excepted).

The Action of Trespass lies where a party claims damages for a trespass committed against him. A trespass is an injury committed with violence, and this violence may be either actual or implied; and the law will imply violence, though none is actually used, where the injury is of a direct and immediate kind, and committed on the person, or tangible and corporeal property, of the plaintiff. Of actual violence, an assault and battery is an instance; of implied, a peaceable but wrongful entry upon the plaintiff's land. The form of the Summons and Capias is similar to that in Debt (the name of the action only excepted).

The Action of Trespass upon the Case lies where a party sues for damages for any wrong or cause of complaint to which covenant or trespass will not apply. This action originates in the power given by the statute of Westminster 2, to the clerks of the Chancery to frame new writs *in consimili casu* with writs already known. Under this power they constructed many writs for different injuries, which were considered as *in consimili casu* with, that is, to bear a certain analogy to, a trespass. The new writs invented for the cases supposed to bear such analogy, received, accordingly, the appellation of writs of trespass on the case (*brevia de transgressione super casum*), as being founded on the particular circumstances of the case thus requiring a remedy, and to distinguish them from the old writ of trespass; and the injuries themselves, which are the subject of such writs, were not called trespasses, but had the general names of torts, wrongs, or grievances. The writs of trespass on the case, though invented thus, *pro re nata*, in various forms, according to the nature of the different wrongs which respectively called them forth, began nevertheless, to be viewed as constituting, collectively, a new individual form of action; and this new genus took its place, by the name of Trespass on the Case, among the more ancient actions of debt, covenant, trespass, &c. Such being the nature of this action, it comprises, of course, many different species. There are two, however, of more frequent use than any other species of trespass on the case, or, perhaps, than any other form of action whatever. These are *assumpsit* and trover.

The Action of *Assumpsit* lies where a party claims damages for breach of simple contract, *i.e.*, a promise not under seal. Such promises may be expressed or implied; and the law always implies a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application. The action of trover is that usually adopted (by preference to that of detinue) to try a disputed question of property in goods and chattels. In form, it claims damages; and is founded on a suggestion in the writ (which in general is a mere fiction), that the defendant found the goods in question, being the property of the plaintiff; and proceeds to allege that he converted them to his own use.

The form of the Summons and Capias in Trespass on the Case is similar to that in Debt (the name of the action only excepted).

The Action of Replevin, though entertained in the superior courts is not commenced there; and the writs of summons and capias, provided by 2 Will. IV. c. 29, for the commencement of personal suits in the superior courts, are consequently not applicable to this action. A replevin is entertained in the superior courts by virtue of an authority which they exercise of removing suits, in certain cases, from an inferior jurisdiction, and transferring them to their own cognizance. Where goods have been distrained, a party making plaint to the sheriff may have them replevied, that is, redelivered to him upon giving security to prosecute an action against the distrainer for the purpose of trying the legality of the distress; and — if the right be determined in favor of the latter — to return the goods. The action so prosecuted is called an action of replevin, and is commenced in the county court. From thence it is removed into one of the superior courts by a writ either of *recordari facias loquelam* or *accedas ad curiam*. In form, it is an action for damages, for the illegal taking and detaining of the goods and chattels. It is held that a replevin may be had, and an action of replevin brought, upon other kinds of illegal taking, besides that by way of a distress; but in no other case is the proceeding now known in practice.

NEW YORK CODE OF CIVIL PROCEDURE (1849), § 69.

The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and

the redress of private wrongs, which shall be denominated a civil action.

MASSACHUSETTS PRACTICE ACT (1851), § 1.

Sect. 1. There shall be only three divisions of personal actions:

First. Actions of Contract, which shall include those now known as actions of *assumpsit*, covenant, and debt, except for penalties.

Second. Actions of Tort, which shall include those now known as actions of trespass, trespass on the case, trover, and all actions for penalties.

Third. Actions of Replevin.

SUPREME COURT OF JUDICATURE ACT (England, 1873), Schedule I, rules 1 and 2.

1. All actions which have hitherto been commenced by writ in the Superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which have hitherto been commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action.

All other proceedings in and applications to the High Court may, subject to Rules of Court, be taken and made in the same manner as they would have been taken and made in any Court in which any proceeding or application of the like kind could have been taken or made if this Act had not passed.

2. Every action in the High Court shall be commenced by a writ of summons, which shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and which shall specify the Division of the High Court to which it is intended that the action should be assigned.

POMEROY, CODE REMEDIES (1876), secs. 28, 29.

28. In the year 1848 the Legislature of New York adopted the Code of Procedure. The fundamental principles of this code, so far as it is now necessary to notice them without going into detail, are the following: (1) The abolition of the distinction between suits in equity and actions at law, and the distinctions between legal and equitable procedure, so far as such an amalgamation or

consolidation is possible with the judicial institutions which have been retained; (2) The abolition of all common-law forms of action, and the establishment of one ordinary, universal means by which rights are maintained and duties enforced in a judicial controversy, called a "civil action"; (3) The application to this "civil action" of the familiar equitable rather than legal rules, methods and principles, so far as practicable, and especially in reference to the parties, the pleadings, and to the form and character of the judgment. It is evident, from the most cursory examination of this code, that its authors, and presumably the legislature, intended that the various provisions which they introduced in reference to the parties to an action, to the pleadings therein, and to the judgment which might be rendered, and which were a concise statement of the well-settled doctrine of equity relating to these subjects, should apply fully and freely to all actions which might thereafter be brought, and should not be confined to actions that, under the former practice, would have been equitable. Whether the courts have at all times recognized and carried out this plain intention of the statute may well be doubted. I have been careful in the above statement as to the union of law and equity. The language of the code is as follows: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." A subsequent provision, based upon the clause in the state constitution which preserves the jury trial "in all cases in which it has heretofore been used," recognizes the fact that the jury trial must still be retained in all actions which were before denominated legal, with the unimportant exception which formerly existed, — namely, where the trial will require the examination of a long account, — and thus, in express terms, prevents an absolute identity in the judicial proceedings which result in remedies that would have been legal and in those which result in remedies that would have been equitable. As I have already said, the perpetuation of the very fundamental element of difference between the trial at law and the trial in equity — and the perpetuation cannot be avoided as long as the constitution remains unchanged in this respect — prevents a complete removal of the difference between legal and equitable procedure and the absolute union of law and equity into one homogeneous system. How far the differences between the final remedies

which courts of law granted exclusively, — namely, the recovery of a specific tract of land or of a specific chattel, and the recovery of money in the form of pecuniary compensation, — and the infinite variety of special remedies which courts of equity were accustomed to grant, may in themselves prevent such a perfect union, I shall discuss and attempt to determine in a subsequent chapter.

29. The New York Code, in respect to the fundamental principles and provisions which I have stated, has been adopted in twenty-two states and territories of this country — in the states of Ohio, Indiana, Wisconsin, Iowa, Minnesota, Kentucky, Missouri, Kansas, Nebraska, Nevada, Oregon, California, North Carolina, South Carolina, Florida, Arkansas, Connecticut, and in the Territories of Washington, Montana, Idaho, Dakota, Wyoming, Arizona, Colorado. I need not now compare these different state and territorial codes in their details; it is enough for my present purpose to say that they all embody the same three fundamental principles.

CHAPTER VII

THE ELEMENTS OF PROCEDURE

1. AT LAW

SMITH, ELEMENTARY VIEW OF THE PROCEEDINGS IN AN ACTION AT LAW, 19.

The history and constitution of the courts in which an action is commenced, having been thus stated, it is time to proceed to the consideration of the steps taken in the action itself. Before doing so, however, it is right to state in what manner these formal steps are liable to be affected or controlled by the summary, or, as it is sometimes called, equitable jurisdiction, of the courts, for the jurisdiction of the superior courts is of two descriptions, summary and formal. The latter consists in the sanction given by the authority of the court to those formal *de cursu* proceedings which constitute the ordinary and regular steps in a suit; thus, it is by virtue of its formal jurisdiction that the court issues a writ to compel the defendant to appear; that it allows the plaintiff to sign judgment against him if he make default in pleading; that it issues process commanding the sheriff to convene a jury for the purpose of trying the cause; and, finally, that it awards execution in favor of the successful party. This is all done by virtue of its formal *de cursu* jurisdiction.

But the courts have another sort of jurisdiction, a jurisdiction exercised in any stage of the suit in which it becomes necessary, and enabling them, in a summary manner, and on equitable principles, to prevent hardships, irregularities, and abuses, which would otherwise take place in the course of proceedings. This is called their summary jurisdiction, and is exercised by making rules and orders; not that every rule emanates from the equitable jurisdicton of the court; some rules there are which constitute part of its formal *de cursu* proceedings; for instance, a rule to plead, is as regular a step as the plea itself. It is not, therefore, intended to state, that all rules, or all orders, emanate from the summary and equitable jurisdiction of the court, but those only, on granting or refusing which, the court or judge hears argument and exercises a discretion.

In treating of the summary jurisdiction of the Courts, we will inquire, 1st, in what cases it exists; 2ndly, how it is exercised.

First, then, when does it exist? It exists, either at common law, or under the provisions of certain acts of Parliament. So far as it exists at common law, it is calculated to effect one of four purposes.

1. To prevent the regulations of the Courts from being infringed.
2. To prevent their authority from being abused.
3. To prevent it from producing hardship.
4. To enforce good conduct on the part of those who are peculiarly within their jurisdiction.

First, then, the Court interferes summarily, to prevent breaches of its own regulations. Under this head do all those cases range themselves, in which it interferes to set aside proceedings for irregularity. . . . In every case where a rule or regulation of the Court is infringed, it will, on application, set aside the proceeding which has infringed it. But it is most important to remember, that every application upon this score must be made as speedily as possible. . . .

Secondly. — The Court exercises its summary jurisdiction to prevent its own process or authority from being abused. Thus, if a designing person were, by false representations, to induce a poor ignorant man to sign a *cognovit*, or execute a warrant of attorney, the Court would relieve him. So, if a warrant of attorney were given to secure usurious interest. So, if a judgment were signed contrary to good faith. So, if a plaintiff vexatiously bring two actions for the same cause, the Court will force him to elect between them. In these cases, and such as these, the Courts interfere, in order to prevent their rules and their authority, created, as both are, for the advancement of justice, from being perverted and abused, so as to produce injustice and oppression. And it is plain that the administration of the laws would be in danger of falling into disrepute, were it not for this salutary exercise of their jurisdiction.

Thirdly. — The third class of cases in which the Courts exercise their summary jurisdiction, is, where it is necessary so to do, in order to prevent their own rules from producing hardship. Thus, where a defendant, through some accident, has not delivered his plea within the proper time, and judgment by default is signed against him, this, though illiberal, when done so hastily as to amount to what is called "snapping a judgment," is nevertheless regular, because the rules of the Court give the plaintiff a right to do it. However, as it would be an extremely hard thing if he were to

be shut out of a good defense by a slight mistake on the part of his attorney, the Court, to prevent this hardship, will interpose its summary jurisdiction in his favour, and will set aside the judgment upon proper terms. In a word, whenever the suitor can point out some great hardship likely to arise from a strict observance of the rules by which the practice of the Court is governed, there he may apply for relief, which, ordinarily, will be granted; unless, indeed, he be wilfully late in making application, or, unless the grant of relief to him, would impose hardship on the opposite party. But this relief is granted as a favor, not as a right, and the Court will, in bestowing it, impose any terms it thinks proper. Thus, it almost invariably imposes the payment of any costs which the other party may have incurred, and frequently, as for instance, in the case of setting aside a regular judgment, insists upon an affidavit of merits; and this is very right, for how ridiculous would it be to relieve a defendant from a judgment when he has no meritorious defence to the action, but is only anxious to postpone the payment of a fair debt, and set up vexatious quibbling objections to a just demand.

Under this head are also to be ranked applications for further time to plead, orders for which are all considered in the light of relaxations of the strict practice of the Court, and so likewise are the applications so frequently made for leave to amend.

Fourthly. — The Courts exercise their summary jurisdiction for the purpose of preventing misconduct in their own officers and persons immediately under their control. Thus, as attorneys are officers of the Courts, supposed to be always in attendance there, and invested as such with certain privileges and immunities, the Courts think themselves bound to enforce the strictest observance of good faith and propriety on their part, and will always listen to complaints founded upon their conduct as attorneys. I say as attorneys, for the Courts do not attempt to exercise control over their conduct in their own private affairs, which have nothing to do with their professional character.

BLACKSTONE, COMMENTARIES, III, 279.

The next step for carrying on the suit, after suing out the original, is called the process; being the means of compelling the defendant to appear in court. This is sometimes called original process, being founded upon the original writ; and also to distinguish it from mesne or intermediate process which issues, pending the suit, upon

some collateral interlocutory matter; as to summon juries, witnesses, and the like. Mesne process is also sometimes put in contradistinction to final process, or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *præcipes*, and also upon all personal writs for injuries not against the peace, by summons, which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers, called summoners, either in person or left at his house or land in like manner as in the civil law the first process is by personal citation, *in jus vocando*. This warning on the land is given, in real actions, by erecting a white stick or wand on the defendant's ground, (which stick or wand among the northern nations is called the *baculus nunciatorius;*) and by statute 31 Eliz. c. 3., the notice must also be proclaimed on some Sunday before the door of the parish church.

If the defendant disobeys this verbal monition, the next process is by writ of attachment or *pone*, so called from the words of the writ, "*pone per vadium et salvos plegios*, put by gage and safe pledges, A. B. the defendant, etc." This is a writ not issuing out of chancery, but out of the court of common pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking gage, that is, certain of his goods, which he shall forfeit if he doth not appear; or by making him find safe pledges or sureties who shall be amerced in case of his non-appearance. This is also the first and immediate process, without any previous summons upon actions of trespass *vi et armis*, or for other injuries, which though not forcible, are yet trespasses against the peace, as deceit and conspiracy; where the violence of the wrong requires a more speedy remedy, and therefore the original writ commands the defendant to be at once attached, without any precedent warning.

If, after attachment, the defendant neglects to appear, he not only forfeits this security, but is moreover to be further compelled by writ of *distringas* or distress infinite; which is a subsequent process issuing from the court of common pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards by taking his goods and the profits of his lands, which

are called issues, and which by the common law he forfeits to the king if he doth not appear. But now the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff. In like manner, by the civil law, if the defendant absconds, so that the citation is of no effect, "*mittitur adversarius in possessionem bonorum ejus.*"

And here, by the common as well as the civil law, the process ended in case of injuries without force; the defendant, if he had any substance, being gradually stripped of it all by repeated distresses, till he rendered obedience to the king's writ; and, if he had no substance, the law held him incapable of making satisfaction, and therefore looked upon all further process as nugatory. And besides, upon feodal principles, the person of a feudatory was not liable to be attached for injuries merely civil, lest thereby his lord should be deprived of his personal services. But, in case of injury accompanied with force, the law, to punish the breach of the peace, and prevent its disturbance for the future, provided also a process against the defendant's person in case he neglected to appear upon the former process of attachment, or had no substance whereby to be attached; subjecting his body to imprisonment by the writ of *capias ad respondendum.* But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrong-doers, a *capias* was also allowed to arrest the person, in actions of account, though no breach of the peace be suggested, by the statutes of Marlbridge, 52 Hen. III. c. 23, and Westm. 2, 13 Edw. I. c. 11, in actions of debt and detinue, by statute 25 Edw. III. c. 17, and in all actions on the case, by statute 19 Hen. VII. c. 9. Before which last statute a practice had been introduced of commencing the suit by bringing an original writ of trespass *quare clausum fregit,* for breaking the plaintiff's close *vi et armis;* which by the old common law subjected the defendant's person to be arrested by writ of *capias;* and then, afterwards, by connivance of the court, the plaintiff might proceed to prosecute for any other less forcible injury. This practice (through custom rather than necessity, and for saving some trouble and expense, in suing out a special original adapted to the particular injury) still continues in almost all cases, except in actions of debt; though now, by virtue of the statutes above cited and others, a *capias* might be had upon almost every species of complaint.

If therefore the defendant, being summoned or attached, makes default, and neglects to appear; or if the sheriff returns a *nihil,*

or that the defendant hath nothing whereby he may be summoned, attached, or distrained; the *capias* now usually issues: being a writ commanding the sheriff to take the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return, to answer to the plaintiff of a plea of debt or trespass, etc., as the case may be. This writ, and all others subsequent to the original writ, not issuing out of chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called judicial, not original writs; they issue under the private seal of that court, and not under the great seal of England; and are tested, not in the king's name, but in that of the chief (or, if there be no chief, of the senior) justice only. And these several writs, being grounded on the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable. . . .

But where a defendant absconds, and the plaintiff would proceed to an outlawry against him, an original writ must then be sued out regularly, and after that a *capias*. And if the sheriff can not find the defendant upon the first writ of *capias*, and return a *non est inventus*, there issues out an *alias* writ, and after that a *pluries*, to the same effect as the former; only after these words, "we command you," this clause is inserted, "as we have formerly," or "as we have often commanded you": "*sicut alias*," or "*sicut pluries, praecepimus.*" And, if a *non est inventus* is returned upon all of them, then a writ of *exigent* or *exigi facias* may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted, in five county courts successively, to render himself; and if he does, then to take him as in a *capias;* but if he does not appear, and is returned *quinto exactus*, he shall then be outlawed by the coroners of the county. Also by statute 6 Hen. VIII. c. 4, and 31 Eliz. c. 3, whether the defendant dwells within the same or another county than that wherein the *exigent* is sued out, a writ of proclamation shall issue out at the same time with the *exigent*, commanding the sheriff of the county, wherein the defendant dwells, to make three proclamations thereof in places the most notorious, and most likely to come to his knowledge, a month before the outlawry shall take place. Such outlawry is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries; and it is also attended with

a forfeiture of all one's goods and chattels to the king.[1] And therefore, till some time after the conquest, no man could be outlawed but for felony; but in Bracton's time, and somewhat earlier, process of outlawry was ordained to lie in all actions for trespasses *vi et armis*. And since his days, by a variety of statutes, (the same which allow the writ of *capias* before mentioned), process of outlawry doth lie in divers actions that are merely civil; provided they be commenced by original and not by bill. If after outlawry the defendant appears publicly, he may be arrested by a writ of *capias utlagatum*, and committed till the outlawry be reversed. Which reversal may be had by the defendant's appearing personally in court or by attorney (though in the king's bench he could not appear by attorney, till permitted by statute 4 & 5 W. and M. c. 18); and any plausible cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition as if he had appeared before the writ of *exigi facias* was awarded.

Extracts from SMITH, ELEMENTARY VIEW OF THE PROCEEDINGS IN AN ACTION AT LAW.

We have now arrived at the commencement of the action itself, the first step in which is the process.

Process is the means employed for the purpose of obliging the defendant to appear in court, to answer to the action. It also serves the purpose of giving him timely notice of the nature of the claim against him, so that he may, if he please, satisfy it, and thus save himself from the necessity of answering the action at all. And for this purpose, the process always informs him who the plaintiff is, and what is the nature of the intended action; and, where the cause of action is a debt, the process must, according to a very salutary rule of Hilary, 1832, have an indorsement, stating the precise amount of the plaintiff's demand.

The process of the Superior Courts of law consists of writs. Writs are letters missive from the sovereign, commanding the doing or forbearing of some act. Thus, a writ of mandamus issues, as its name imports, to command a performance, a writ of prohibition,

[1] For other examples of this idea of punishing non-appearance, see Salic Law, title 50; Laws of Athelstan, c. 20; Laws of Cnut, c. 25; Gaius, IV, § 46. See also Pollock and Maitland, History of English Law, II, Chap. IX, § 3.

as its name imports, to command the forbearance of some act. Writs are always directed to the person on whom the command is imposed; they are always witnessed or tested, as it is called, in the name of some person appointed for that purpose of law, and they are always returnable in some court or other, that is, there is always some person who is, by law, compellable to bring them into that court, and certify to it what has been done in pursuance of them. These observations apply to all writs whatever. A return of a writ is the sheriff's answer or certificate to the court, touching that which he is commanded to do by any writ directed to him.

The writ of summons is a judicial writ, *i.e.*, a writ issuing out of the Court in which the defendant is to be sued; and as it is now the commencement of the action it cannot be issued before the cause of action is complete, it is directed to the defendant, whom it commands that, within eight days after the service of the writ on him inclusive of the day of such service, he do cause an appearance to be entered for him in the Court in which the action is brought, in an action on promises, or debt, or as the case may be, at the suit of the plaintiff, and requires the defendant to take notice, that in default of his so doing, the plaintiff may cause an appearance to be entered for him, and proceed to judgment and execution.

. . . . . .

An *alias* Writ of Summons, and a *pluries*, continue the first writ, and differ only from it, the former, by mentioning that it commands the defendant, "as before he was commanded," and the latter by its mentioning that it commands him, "as often he was commanded." Each has a memorandum and indorsements, similar to those on the first Writ of Summons.

. . . . . .

As soon as the defendant has appeared, the pleadings commence. These are the altercations which take place between the plaintiff and defendant, for the purpose of ascertaining the nature of the complaint, the grounds of defence, and the points in controversy between the parties. These pleadings were, in the early ages of the common law, delivered *viva voce* by the counsel. The writ by which the action was commenced used to be brought into Court with the sheriff's return upon it, and the plaintiff's counsel, after it had been read, proceeded to expand the charge contained in it into a connected story, by adding time, place, and other circumstances. Thus, if the writ mentioned the cause of action to be trespass, the plaintiff's counsel stated, where, when, and how, the

trespass was committed, and what special damage had resulted from it. This statement was called the count, from the French *conte*, a tale or story. The defendant's counsel, on his part, stated the defence with similar precision, and this was called the plea. The plaintiff's counsel replied: the defendant's, if necessary, rejoined; and so on, until they had come to a contradiction either in law or fact. If either conceived that the last pleading on the opposite side was untrue in fact, he positively denied it, and was then said "to take issue upon it." If he conceived it to be bad in law, he demurred, so called from the French *demeurer*, to abide, because he abided by the determination of the point of law, conceiving that the insufficiency of his opponent's pleading, furnished him with a sufficient answer to his case. Thus was an issue produced either of fact or law. If of law, it was decided by the Court; if of fact, tried, in most cases, by a jury.

While the proceedings were going on, the officer of the Court sat at the feet of the judges, entering them on a parchment roll of record. This record bore different names at different times. When the pleadings only were in process of being entered, it was called "the plea roll"; when the issue had been joined and entered on it, it was called "the issue roll"; and when the judgment had been recorded on it, it was called "the judgment roll"; being all along the same piece of parchment, but bearing different names at different periods of the suit.

When business increased, and causes became complicated, the system of *viva voce* pleading was found inconvenient, and, instead of pronouncing the pleadings aloud, they were drawn on paper, and filed in the office of the Court, or delivered between the parties. The judges heard nothing about them until issue or demurrer, and, thus, considerable time was saved. As to the roll, that was at first transcribed from the written pleadings by the officers, as anciently from the *viva voce* ones. Afterwards, the officers, finding themselves pressed for time, requested the attorneys to transcribe it themselves; and bring it to the office; and the attorneys, finding this irksome, began to omit carrying it in at all, except in cases where it was wanted for some particular purpose; so that, in most cases, the roll existed only in contemplation of law; and now, does not exist at all till a late period of the suit.

Although the pleadings are now transcribed on paper, they are governed by the very same rules which regulated them when pronounced *viva voce*. There is scarce any branch of the law which

has undergone so few changes as the theory of pleading. Comyn's Digest is as useful to a pleader today as it was when it was written; and it is curious to remark, that, while the new rules have altered the ancient practice in most other cases to which they have been applied, their effect on pleading has been to bring it back to its old bounds, and to destroy innovations which had crept in on the ancient system, and reject that which was not essential in the old forms.

The first step in the pleadings is the declaration. The declaration in the words of Lord Coke "is an exposition of the writ, and addeth time, place, and other circumstances that the same may be triable." The general requisites of it are: — 1. That it should correspond with the writ; for example, if it appear from the declaration that the cause of action accrued after the writ was issued, the declaration will be bad. 2. It must state all facts necessary in point of law to support the action and no more. 3. These facts must be set forth with certainty and truth.

The plaintiff is not confined to the statement of one cause of action only, for the declaration may consist of several counts, and each of those counts may state a different cause of action. Thus, the first count of a declaration in *assumpsit*, may be on a bill of exchange, the second on a promissory note, the third for goods sold and delivered, and so on. But there is this limitation, namely, that all the counts must belong to the same form of action; thus, a declaration must not contain one count in debt, and another in *assumpsit*, one count in trespass, and another in case.

There is, however, one exception to this rule, namely, that debt and detinue may be joined together in the same declaration.

It had been decided in several cases, that any variance between a material part of the statement of the cause of action in the declaration and the evidence adduced at the trial in support of it, was fatal, and a ground of nonsuit. The consequence of this was, that plaintiffs were continually nonsuited, in the most vexatious manner, on account of slight variances between the declaration and the evidence; and to such an extreme was this carried, that there is one case of *Walters* v. *Mace*, 2 B. & A. 756, in which the plaintiff was nonsuited, because, in copying Lord Waterpark's title in the declaration the clerk, instead of writing Baron Waterpark of Waterpark, had written Baron Waterpark of Waterfork. In order to prevent the fatal mischief often occasioned by these trifling variances, pleaders used to insert a great number of counts in the

declaration, stating the cause of action, in different ways, in hopes that, if the evidence varied from some, it might not from others; and that one count, at least, might be found free from objection on the score of variance.

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The plea is the defendant's answer to the declaration by matter of fact, and is either a plea in abatement or a plea in bar. A plea in abatement is one which shews some ground for abating or quashing the original writ in a real or mixed action, or the declaration in a personal action, and makes prayer to that effect; it therefore does not contain an answer to the cause of action, but shews that the plaintiff has committed some informality, and points out how he ought to have proceeded, or, in technical language, "gives him a better writ or declaration." Pleas in abatement are not usual; they are discouraged by the courts as tending to throw technical difficulties in the plaintiff's way. They must, by stat. 4 Anne c. 16, always be verified by affidavit, which must be delivered with the plea, unless, as in *Johnson* v. *Popplewell*, 2 Tyrwh. 717, the distance of the intended deponent's residence from town induces a judge to grant further time. They cannot be amended, and the power of pleading several matters does not extend to them.

A plea in bar, which is the sort of plea most usually resorted to, is a peremptory and substantial answer to the action. Such a plea is either a traverse or a plea in confession and avoidance; there is, indeed, a third sort of plea, entitled "A plea in estoppel" but this is of rare practical occurrence. A plea, when it denies some essential part of the declaration, is said to be a traverse. It is "in confession and avoidance" when it admits the averments of fact in the declaration to be true, but shews some new matter not mentioned in the declaration, which destroys the plaintiff's right of action. Thus, in an action against the maker of a note, if the defendant plead "he did not make the note," that is a traverse. But if he plead "that he did make it, but for an illegal consideration of which the plaintiff was aware," that is a plea in confession and avoidance. A traverse always concludes to the country, that is, in these words, "and of this the said defendant puts himself upon the country, &c." A plea in confession and avoidance always concludes with a verification, *i.e.*, in these words, "and this the said defendant is ready to verify, &c."

At common law, the defendant was allowed but one plea to each count of the declaration; and, for this restriction, a very

unsatisfactory reason was assigned, namely, that, as one defence is sufficient to rebut the action, the defendant could have no occasion to set up more. But it is obvious that a defendant may have several good defenses against the same action, and yet may reasonably wish to plead them all, in order that, if by some accident, his evidence of one of them should fail, he may rely upon another. Accordingly, by stat. 4 & 5 Anne, c. 16, the defendant is at liberty to plead several pleas by leave of the court.

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The subsequent steps in pleading are the replication, containing the plaintiff's answer to the plea; the rejoinder, the defendant's answer to the replication; the surrejoinder, the rebutter, and the surrebutter, and so on. The pleadings seldom reach to surrebutter, but they sometimes do, and there is nothing to prevent their going beyond it, but the steps beyond surrebutter have no distinctive names. At each of these steps the party replying, rejoining or framing any other pleading, must either traverse or confess and avoid, that is, must either deny some material part of the adversary's last pleading, or must admit such last pleading to be true, but allege some new matter, altering the legal effect of it, and showing that he himself is, nevertheless, entitled to judgment. If he traverse he concludes to the country, that is, if plaintiff, he concludes by saying, "and of this the said plaintiff prays may be inquired of by the country, &c."; if defendant, by saying, "and of this the said defendant puts himself upon the country, &c." If he confess and avoid, he concludes with a verification, that is, by saying, "and this he is ready to verify, &c." Thus the pleadings go on, step by step, till at last the parties come, as they necessarily must, to a direct contradiction, which, upon a fact, is called "an issue," if upon a point of law, "a demurrer."

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It has been already said, that at each step in the pleadings either party may, if he think fit, instead of pleading, replying, rejoining, etc., demur to the last pleading of his adversary, that is, he may say it is not sufficient in law. Thus if A sue B as the maker of a promissory note, or as the acceptor of a bill of exchange, of which he, A, is the indorsee, and B pleads that the payee gave him no consideration for it, instead of replying to this plea, A might demur, because, even admitting it to be true, it would be no defense against an indorsee, who must be presumed to have given value until the contrary is shown, because promissory notes and bills of exchange

are an exception to the rule which prevails in the case of other simple contracts; there the law presumes there was no consideration till it appear, and therefore the plaintiff must aver in his declaration on a simple contract that it was made on a good consideration; but in the case of contracts on bills or notes, a consideration is presumed till the contrary appear. If the opposite party thinks the law is in his favor, he joins in demurrer, and then the point is argued and decided by the Court *in banco*. If he finds that he has made a mistake, he usually amends, which a judge will allow him to do on payment of the costs occasioned to the opposite party by his mispleading.

A demurrer is either general or special. A general demurrer lies when the objection is a substantial one, as in the case just put by way of example. A special demurrer must be used where the objection is merely technical and formal, as, for instance, if the defendant were, as in the case of *Margetts* v. *Bays*, 4 A. & E. 489, to plead that the supposed debt if any, did not accrue within six years, that would, according to that case, be bad on special demurrer, as neither traversing the declaration nor confessing and avoiding it; for it is one of the fundamental rules of pleading, that after the declaration the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance; but the statute 27 Eliz. c. 5, requires that the objection, when a technical and formal one, should be pointed out specially at the conclusion of the demurrer.

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It frequently happens that the defendant, in his plea, takes issue or demurs, and then the pleadings terminate, and the decision of the issue or demurrer is the next thing to be attended to. It sometimes, however, happens that the pleadings run on through the steps of replication, rejoinder, and even though more rarely rebutter and surrebutter. If the plaintiff neglects to take any of those steps which it is incumbent on him to take, within due time, he is liable to judgment of *non pros.*, and the defendant, in case of similar neglect on his side, to judgment by default.

Assuming that the different steps are taken in their due time, an issue either of law or fact is ultimately produced, and the object of the pleadings thus accomplished. For the object of the whole system of pleading is to bring the parties to an issue, to elicit the real points in controversy between them. If these are points of law, they are argued before the Court, if of fact, tried by a jury.

Frequently it turns out that there are several issues, some of law and some of fact. Thus one count or one plea may be demurred to, and the others traversed. When this happens, the demurrer must be decided by the Court, and the issues of fact by a jury. But when the defendant's plea goes to bar the action if the plaintiff demur to it and the demurrer is determined in favor of the plea, judgment of *nil capiat*, it seems, shall be entered, notwithstanding there may be also one or more issues in fact, because on the whole it appears that the plaintiff had no cause of action. So where several pleas go to destroy the action, and one or more issues are joined on some of the pleas, and there are one or more demurrers to the rest, if the Court determine the demurrer in favor of the defendant before the issues are tried, they shall not be tried, and if after, it will make no difference in each case, judgment of *nil capiat* shall be given against the plaintiff. Saund. vol. i, 80.

The mode in which these decisions are obtained is therefore the next matter to be considered.

Before, however, stating the mode in which an issue is decided, it appears right to touch on one or two matters of very ordinary occurrence, and which usually take place during the pleadings, at all events previous to the decision of the issue.

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Another application which may be, and frequently is, made, both by plaintiffs and defendants, is for the oyer of a deed, or inspection of some written instrument. With respect to oyer, the rule is, that whenever either party in his pleadings states a deed which operates at common law or letters of administration, he is bound to make *profert*, as it is called, that is, he is obliged to say that he brings the instrument into court, being a translation of the words *profert in curiam*, used by the ancient pleaders. The other party may then, if he please, crave oyer of its contents, which the party making *profert* is obliged to give him, and he is entitled to as many days for taking his next step in pleading after he has had the oyer, as he was before he demanded it.

The practice of making *profert* and demanding oyer is of great antiquity, and forms part of the old system of *viva voce* pleading. Under that system, the party who relied on a deed used to produce it in the open court; the opposite party might pray to hear it read, which he did by using the Norman word oyer "to hear" — a corruption of which into O yes is still used by a crier making proclamation. On oyer being craved, the deed was read aloud by the officer of the

court, a practice for which that of the attorneys demanding it from one another was afterwards substituted.

The defendant, when he has craved and obtained oyer of a deed, ought properly to set it out at full length at the head of his plea, in order that it may appear upon record, and be referred to if necessary.

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As to inspection. It sometimes happens that one of the parties is in fairness entitled to inspect some document, the contents of which will be of service to him in conducting his case, but which not being pleaded, or not operating at common law, there is no *profert* of it, and consequently he cannot demand oyer. Under such circumstances his course is to apply, by way of motion, that he may be permitted to inspect the document in question which he will be allowed to do, if it turn out that he is in fairness and equity entitled to do so.

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Another ordinary application on the part of defendants is, that several actions may be consolidated, they undertaking to abide by the event of one of them. This application is most frequently made in actions against underwriters upon a policy of insurance, where, as the question is the same against each underwriter, since if one be liable to the loss the rest of course are so, it is usual for the defendants to move for what is called the consolidation rule, a rule which was invented by Lord Mansfield, and the effect of which is to bind the defendants in all the actions by the verdict in one.

In the instance given it is necessary that several actions should be brought, the defendants being separate and several, and generally the plaintiff's consent to the rule must be had. But cases sometimes occur in which separate actions are vexatiously commenced against a defendant, as where several causes of actions are complete at the same time or nearly so, whereupon the court will interfere and consolidate the actions, or suspend the trial.

It sometimes happens that the plaintiff is resident out of the jurisdiction of the court, in which case, as it is obvious that the defendant would, in case of the action proving unsuccessful, have no means of obtaining his costs, the court will, upon an application made in proper time, stay his proceedings until he give security for costs. There is a rule of Hilary, 1832, sec. 98, which obliges the defendant to make this application before issue joined. When the application is made in due time, it is so much of course to grant

it that even a foreign potentate suing in our courts is obliged to find security.

The last of these occasional applications of which notice need here be taken is for the purpose of changing the venue. The venue as has already been said, is the county mentioned in the margin of the declaration, and it has been shown in what cases it is local and in what transitory; that it is local when the cause of action could not have taken place in any other county, as, for instance, in actions of trespass *quare clausum fregit;* transitory, where the cause of action might have happened in another county, as in actions of trespass for assault and battery. Now at common law, the rule was, that in a transitory action the plaintiff might lay the venue wherever he pleased. But this was found to create so much vexation, in consequence of plaintiffs laying venues at a great distance from the defendant's residence, that it was enacted by stat. 2 Rich. 2, c. 2, that the venue should be laid in the county where the cause of action arose.

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Anciently there were a variety of modes of trial appropriated by the law, as it once stood, to various states of circumstances. Those which remain in force are: —

1. Trial by inspection is when the matter in dispute being the object of sight, the judges of court, upon the evidence of their senses shall decide it.

2. By certificate, a mode confined to one or two very unusual causes, is where the evidence of the person certifying is the only criterion of the point in dispute. Thus the certificate under seal of the king's mareschal that A was absent with the king and his army, shall be conclusive of that fact.

3. By witnesses. Without a jury, when the judge forms his sentence upon the credit of the witnesses examined, as when a widow brings writ of dower, and the plea is, that the husband is not dead. This being regarded as a dilatory plea, is allowed to be tried in this mode, which is more unusual still than either of the former.

4. By the record. This takes place when issue happens to be joined between the parties, as it sometimes is, upon the existence or non existence of a particular record; as whether A is an earl or not, is triable by the crown-patent only, which is a matter of record, or if created by writ, then by record of Parliament. In such a case, as it is a maxim that a record can only be proved by itself, and it is so absolute as to admit of no contradiction, it would be

useless to convene a jury for the purpose of determining that which the court on the production of the record is bound to take notice of. Accordingly, when some pleading denies the existence of a record, the issue joined thereon, and which is called an issue of *nul tiel record*, concludes with an entry, stating that which would anciently have been stated by the court *viva voce* on such an occasion, namely, that a day is assigned for the production of the alleged record and the judgment of the court thereon. On the day named which must be in Term, as the issue is triable only before the Court in Banc, the record, being brought into court is examined with the statement in the pleading which alleges it, and if they correspond, the party asserting its existence obtains judgment, otherwise, his adversary.

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The fifth and last existing mode of trial, and that which is alone of any very great practical importance, is by jury, and this requires a somewhat more protracted consideration. It is applicable to the trial of every issue of fact, which according to the modern practice is joined on the pleadings, except in the case of an issue taken upon the existence of a particular record.

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When the plaintiff has made up his mind to try the cause, he must prepare his briefs and evidence. The brief contains a statement of the pleadings, case, and evidence, for the information of the counsel whom he intends to employ. With respect to the evidence, that will of course be either oral or documentary. Where the attendance of witnesses is required, he may procure it by suing out writs of subpœna, copies of which must be served a reasonable time before the trial on the intended witnesses, and their necessary expenses at the same time tendered to them; after which, if they neglect to attend, the plaintiff may proceed against them, either by way of attachment, to punish their contempt of court, or by way of action, to indemnify him for the injury he has sustained in consequence of their absence. The writ of subpœna may be issued to any part of England. If the witness be either in a foreign state, or in England under such circumstances as render his personal attendance in court impossible, application must be made to the court, which has power to order his examination before the master, prothonotary, or any other person, if he be within its jurisdiction, or to issue a commission for his examination if he be without. As to documentary evidence, if the instruments, the proof of which

is required be in the party's own possession, he must produce them; if in that of his adversary, he must give him a notice to produce them, and, in case of non-compliance, will be allowed to give secondary evidence of their contents. If they be in the hands of a third person, the attendance of that person with them must be enforced by a *subpœna duces tecum*.

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We will now suppose that the jury have been summoned, and are in attendance, and the cause called on as it will be if properly entered in its due turn. If no motion be made to put off the trial, and the plaintiff being ready is not forced to withdraw his record, the first step taken is to empanel and swear the jury. The jurors are called over and sworn, and as they are called over, may, in the case of a common jury, if either party object to them, or any of them, be challenged. Challenges are either to the array or to the polls. Challenges to the array are exceptions to the entire panel, in consequence of some partiality imputed to the sheriff or other officer who arrayed it. Challenges to the polls are exceptions to particular jurors, and are of four kinds: First, *propter honoris respectum*, as, if a lord of parliament were to be empaneled; secondly, *propter defectum*, as if one of the jurors be an infant, alien, idiot, or lunatic, or have not a sufficient estate; thirdly, *propter affectum*, or for partiality, and this is either principal, *i.e.*, carrying with it a manifest ground of suspicion, or to the favor. A challenge is principal when the juror is related within the ninth degree to either party, or has been arbitrator, or is interested in the cause, or has an action depending with one of the parties, or has taken money for his verdict, or formerly been a juror in the same cause, or is a master, servant, counsellor, steward, or attorney to, or of the same society or corporation with one of the parties; all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*. A challenge to the favor is grounded only on some probable cause of suspicion, as acquaintance or the like, the validity of which is determined by triors; these, if the first juror be challenged, are two indifferent persons named by the court; if they find one man indifferent, he shall be sworn, and he with the two triors shall try the next, and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest.

Fourthly, *propter delictum;* this species of challenge may take place when the juror is tainted by some crime or misdemeanor which affects his credit.

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As soon as the jury have been sworn, the junior counsel for the plaintiff opens, that is, shortly states the pleadings, and the leading counsel on that side which has the right to begin proceeds to address the jury. This right to begin is frequently a matter of the very greatest importance, for it is an invariable rule that the counsel who begins has, if the opposite side call witnesses, a right to reply; and it is well known from experience, that in a doubtful case, the reply of an able advocate frequently determines the fate of the action. And this occasions sometimes the exertion of great ingenuity on the part of the pleaders who put every art in practice for the purpose of securing for their clients a privilege of so much importance. An inexperienced person is sometimes surprised seeing an experienced pleader admit facts to his own disadvantage upon the record, which he might, if he so pleased, have traversed, not divining that these seeming omissions are purposely committed, with a view of securing, if possible, the last word to the jury.

The question, which side shall be entitled to begin, is governed by general maxims, *Ei incumbit probatio, qui dicit non qui negat;* for, as it is very difficult, and sometimes impossible, to prove a negative, it is natural that the *onus* of proof should be upon the party asserting the affirmative, and this is, generally speaking, the rule of law; for instance, if to an action on a promissory note, the defendant pleaded "that he did not make the note" the affirmative being on the plaintiff, it would be for him to begin; but, if the defendant had pleaded "that he paid the note," then the affirmative would be on him, and he would begin at the trial.

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The case having been opened, witnesses are called for the party beginning; the counsel on the opposite side has then an opportunity of laying his case before the jury, and if he call witnesses, the party who commenced has a right to the reply. The judge then sums up and the jury returns the verdict, which is either general, for the plaintiff or defendant, or special, stating all the facts of the case, and leaving it to the court to pronounce a proper judgment. When a special verdict is found the case is set down for argument, and discussed before the full court, in the same way as a

demurrer; and the judgment pronounced upon it may, if the unsuccessful party please, be reviewed by writ of error.

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But the most ancient modes of carrying a point of law raised at the trial before a superior tribunal, were by bill of exceptions or demurrer to the evidence. The latter species of proceeding is now almost obsolete; it consisted in either party's admitting all the facts adduced in evidence to be true, and every conclusion which the evidence given conduced to prove, but asserting that the law arising upon them all was in his own favor, and that he was entitled to judgment, the precise operation of which is to take from the jury and refer to the judges the application of the law to the facts, whereas ordinarily the judge declares to the jury what the law is upon the facts, which they find, and then they compound their verdict of the law and the fact thus ascertained.

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A bill of exceptions is a proceeding by no means unusual, even at the present day. It occurs, when the counsel for either party is dissatisfied with the direction of the judge trying the cause, in point of law, or with his rejection or admission of evidence. In such a case, he may draw up his objections in writing, and tender them to the judge at the trial and before verdict, who is, if they be truly stated, bound by stat. West. 2 (13 Edw. 1, c. 31) to affix his seal to the document. This bill of exceptions is then tacked to the record of which it becomes part, and may be carried into a court of error if advisable; and the only mode of taking advantage of it is by writ of error, for the court in which the action was brought does not take any notice of it, but gives judgment as if it were not in existence.

It sometimes happens, that instead of going on to verdict, the trial is suddenly put an end to in a mode not requiring the intervention of the jury. This may happen in four different ways; first, by the plaintiff's suffering a nonsuit; secondly, by the parties agreeing to withdraw a juror; thirdly, by the judge discharging the jury from finding any verdict.

With regard to a nonsuit — the word is derived from the Latin *non sequitur*, or more nearly from the French *ne suit pas*, because the plaintiff does not follow up his suit to its legitimate conclusion; for, in the ancient times before the jury gave their verdict, the plaintiff was called upon to hear it, in order that, if it proved adverse to him, he might be held answerable for the fine which was in those days levied upon an unsuccessful plaintiff. If he did not

appear when thus called upon, he was nonsuited, that is, adjudged to have deserted his action, and the court gave judgment against him for his default. And hence proceeds the ceremony, which takes place even at this day, of calling the plaintiff to come into the court when about to be nonsuited and warning him that he will lose his writ of *nisi prius*, that is, that he will lose the benefit of the jury process by which he has convened the jury who are now about to become superfluous in consequence of his default in not appearing.

Another consequence of the ancient practice is, that a plaintiff cannot be nonsuited against his will; for a default is, in the nature of things, voluntary, and when he is called upon to appear he may, if he think fit, make answer by his counsel, and, if he do, there can be no nonsuit; and, although it is usual and certainly highly proper, for the plaintiff's counsel to yield to the opinion of the judge, when the latter intimates that his case is not made out, and that he ought to suffer a nonsuit, still, there have been instances, in which the plaintiff's counsel have persisted in appearing and have even gained a verdict by their pertinacity. But it is very dangerous to resist the judge, when he is of opinion that there ought to be nonsuit, for if the plaintiff disregard his intimation he is certain to direct the jury to find the verdict for the defendant, and though it is true that the plaintiff whether he submit to a nonsuit, or have a verdict found against him, must equally pay costs to the defendant, still there is this great practical difference between a verdict for the defendant and a nonsuit, namely, that the former has the effect of forever barring and determining his right of action, whereas, after the latter he may bring a fresh action, and if he come prepared with better evidence, may perhaps succeed in it.

The withdrawal of a juror takes place when neither party feels sufficient confidence to render him anxious to persevere till verdict. In such case, they may, by consent, for it cannot be done otherwise, withdraw a juror, and as that leaves the jury incomplete, there can be no verdict, and the trial comes to an end; a party who consents to such arrangement is bound by it, and the court will stay fresh proceedings in the same cause, as being contrary to good faith. It is a kind of drawing stakes, and leaves each party to pay his own costs.

It sometimes becomes necessary to discharge the jury, either on account of the sudden illness of a juryman, as in *Rex* v. *Edwards*, 3 Campb. 207, or because they cannot agree, in which case, when

there is no hope of their resolving on a verdict, it is now the practice to discharge them.

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The proceedings next to be considered are those in which the result of the trial at *nisi prius* obtained in the manner above described may, in the ensuing Term, be impeached or controlled. These are:

1. A motion for a new trial.
2. To enter a verdict or nonsuit, pursuant to leave reserved.
3. For a *venire de novo*.
4. For judgment *non obstante veredicto*.
5. In arrest of judgment.
6. For a repleader.

A motion for a new trial, which is the most ordinary of these applications, is a proceeding of which we find no instance till the year 1665. In that year, in the case of *Wood* v. *Gunston*, Styles 462, 466, we meet with the first reported instance of a motion for a new trial. In ancient times, the mode of impeaching the verdict, if not warranted by the evidence, was one of the most barbarous and most extraordinary that it could have entered into the imagination of man to devise. It was supposed that, if twelve men gave an untrue verdict, they must have been actuated to do so by corrupt motives; and, therefore, the unsuccessful party was at liberty to sue out a writ called "a writ of attaint," of which there is an account in Finch's Law, 484, and which, at first, applied to real actions only, but was extended by 34 Edw. 3, c. 7, to all actions whatever. Under the authority of this "writ of attaint," a jury of twenty-four men was convened, to try the validity of the first verdict; the same evidence only was allowed upon the second trial, as had been given on the first; and if, upon the second trial, the jury of twenty-four returned a verdict contrary to that of the first jury, not only was the first verdict set aside, but the Court pronounced upon the jury who gave it, judgment that they should lose all civil rights, and be perpetually infamous; that they should forfeit all their goods, and the profits of their lands; should be themselves imprisoned, their wives and children driven out of doors, their houses razed, and their lands wasted. Although the barbarity of this proceeding caused it, as may be readily supposed, to become obsolete as civilization progressed, yet there are instances of its having been resorted to in the reign of Elizabeth, and it was not formally abolished until stat. 6 Geo. 4, c. 50, s. 60.

When this absurd and frightful process fell into disuse, the courts, finding it absolutely necessary that some mode should exist of rectifying the erroneous verdict of a jury, began to listen to the applications which have now become frequent, and they founded their power of doing so on this principle, namely, that if the jury gave a wrong verdict, that would not warrant them in pronouncing an iniquitous judgment: and therefore if there appeared reason to fear that such would be the consequence they had the right to refer the cause to another examination, and, accordingly, a motion for a new trial may now be made on any ground which raises a fair probability that the verdict at the first trial was erroneous.

The grounds on which an application for a new trial is usually based are 1st, that the judge who tried the cause misdirected the jury in point of law, or committed a mistake by admitting evidence which ought to have been refused, or rejecting evidence which ought to have been admitted; for in such cases, as the jury have been misinformed of the true point they were convened to try, or have been deprived of proper, or furnished with improper materials to build their conclusion on, it cannot be expected that they should have returned a proper verdict; and, though it was once thought, that, if a judge rejected evidence which, though admissible in point of law, could not be reasonably supposed to bear sufficient weight to have induced the jury to arrive at a different verdict, even had it been submitted to them, the rejection of such evidence would not be a sufficient ground for a new trial: still, as it is impossible to estimate the precise effect which an additional fact, however trivial, may produce, upon the minds of others, the Court of Exchequer, in the late case of *Crease* v. *Barrett*, 5 Tyrwh. 475, expressed their opinion, that, if the evidence improperly rejected could have had any effect whatever on the jury, there ought to be a new trial.

Another ground of application is, that the successful party misbehaved. As in the case of *Coster* v. *Merest*, 3 B. & B. 272, where handbills reflecting on the plaintiff's character had been distributed about the court and even shewn to the jury. So if any of the jury have misbehaved, it is a ground for a new trial, as in *Ramadge* v. *Ryan*, 9 Bing. 333.

Another ground on which a new trial is sometimes allowed, is, that the damages are excessive. In actions, indeed, for personal tort, such as slander, or malicious prosecution, and especially in actions for criminal conversation or seduction, the courts are extremely averse to grant a new trial, unless the damages given at

the first were perfectly outrageous. New trials have been granted also when the former verdict was obtained by surprise, or the witnesses for the prevailing party are manifestly shewn to have committed perjury. In short, whenever it can be made out to the satisfaction of the court that a new trial should be had, there the application may be made, and it is in the power of the court to accede to it.

One of the commonest grounds on which new trials are applied for, is, that the verdict has been either against the weight of the evidence, or without any evidence at all. Where there was no evidence at all to warrant the conclusion come to by the jury the court will always grant a new trial. But, where there was some evidence upon the winning side, they interfere, if at all, with great reluctance, considering that where there is conflicting testimony, it is the province of the jury, not the court, to strike the balance.

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A motion for *venire de novo*, is a proceeding very similar to that for a new trial, and its effect, if granted, is identical; for, when a *venire de novo* is awarded, another trial of the cause is had, as if a rule for a new trial had been made absolute; and, indeed, the very name of the proceeding itself so signifies, for the words *venire de novo* mean no more than that a new *venire* (which is the first of the two writs constituting the jury process) is to be directed to the sheriff. Still, there are several distinctions between a motion for a *venire de novo*, and for a new trial. The new trial is grantable for any reason which renders it right, fit, and just that the first verdict should undergo revision. And, though in some cases, for instance those of misdirection, or the improper admission or exclusion of evidence, a new trial is a matter of right, still, there are also many cases in which it lies in the absolute discretion of the Court to grant or refuse it; or, if they grant it, to modify the rule by which they do so, by introducing such conditions as they deem proper. But it is otherwise with the award of a *venire de novo*, which is a proceeding far more ancient than the motion for a new trial. In cases where it is grantable, the Court is bound to grant it, and can exercise no discretion on the subject. But then those cases are comparatively few in number, and the grounds for awarding it are not, as in many of the instances in which a new trial is granted, of an equitable description, but are of a more technical sort — such as the wrongful disallowance of a challenge, or some defect in the wording of the verdict, which renders it uncertain and ambiguous. Nor

can the Court, as in the case of a new trial, impose a condition on the party claiming the *venire de novo*, or exercise any discretion as to costs.

A motion for judgment *non obstante veredicto*, is one which, it is said in the late case of *Rard* v. *Vaughan*, 1 Bing. N. C. 767, can only be made by a plaintiff. The lord chief justice there states that there is no instance to be found in any of the books of such a judgment having been awarded at the instance of a defendant. It is given when, upon an examination of the whole pleadings, it appears to the Court that the defendant has admitted himself to be wrong, and has taken issue on some point which though decided in his favor by the jury, still does not at all better his case.

A motion in arrest of judgment is the exact reverse of that for judgment *non obstante veredicto*. The applicant in the one case insists that the plaintiff is entitled to the judgment of the Court, although a verdict has been found against him. In the other case, that he is not entitled to the judgment of the Court, although a verdict has been delivered in his favor. Like the motion for judgment *non obstante veredicto*, that in arrest of judgment must always be grounded upon something apparent on the face of the pleadings; for instance, if in an action against the indorser of a bill of exchange, the plaintiff were to omit to allege in his declaration that the defendant had notice of dishonor, judgment would be arrested even after a verdict in his favor.

A motion for a repleader becomes necessary where it appears that, in the course of pleading, the parties have so mistaken the true question in the case, that they have raised an issue, which for whomever it may be found, will not decide the cause either one way or the other. In such case, as the verdict leaves it totally *in dubio* which party will ultimately prove entitled to recover, the only course by which the true state of the merits can be ascertained is to award a repleader — that is, to direct that the parties shall begin again at that part of the pleadings in which the mistake which led to the immaterial issue was committed and replead, till they have arrived at one more fitted to decide the cause. When it becomes necessary to take this course, as both parties are in fault, neither is entitled to the costs of the proceedings which have turned out useless.

If none of the above applications be successfully made, the next occurrence in the suit is Judgment. This is the sentence of the law upon the matter appearing from the previous proceedings in the suit; and, unless the Court be equally divided in opinion, in which

case no judgment can be given, it is for the plaintiff, by the defendant's confession or default; for the defendant, upon nonsuit, or as in the case of nonsuit, *non pros.*, *retraxit*, *nolle prosequi*, discontinuance, or *stet processus;* and for either party upon demurrer, issue of *nul tiel record* or verdict.

Judgments are either interlocutory or final. Interlocutory judgments are occasionally given upon some plea, proceeding, or default occurring in the course of the action, and which does not terminate the suit. Of this nature are judgments on demurrer, to certain dilatory pleas called Pleas in Abatement. But the most common kind of interlocutory judgments are those which are given when the right of the plaintiff is indeed established, but the quantum of damages sustained by him is not ascertained, which is a matter that cannot be done without the intervention of a jury: this happens when the defendant suffers judgment by default, or confession, or upon a demurrer, or *nul tiel record*, in any of which cases if a specific ascertained demand be sued for, the judgment is final, because then there can be no doubt as to what the plaintiff ought to recover; but, if the demand be of damages unless the defendant will admit that they amount to the whole sum laid in the declaration, a jury must be called on to assess them; therefore the judgment given by the Court, and entered on the record in such a case is, that the plaintiff ought to recover his damages; but because the Court knows not what damages he has sustained, the sheriff is commanded to inquire by a jury, and return the inquisition into court. The process directed to the sheriff for this purpose is called Writ of Inquiry, and when he has returned his inquisition to the Court, final judgment is given that the plaintiff do recover the amount assessed. In some cases, indeed where, though the form of action be for damages, yet it is easy to compute precisely what those damages must amount to, as where the action is brought on a bill of exchange, the Court will order their own officer to assess them instead of issuing a writ of inquiry. And in certain other cases where the claim is really unliquidated, though it appears liquidated in the declaration, the court will direct an inquiry.

As to a final judgment, it puts an end to the action altogether, by declaring either that the plaintiff is or that he is not entitled to recover, and if he be entitled to recover, specifying what.

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Incident to the judgment are the costs, which are awarded therein to the successful party. . . . Costs are either interlocutory or

final. Interlocutory costs are given upon matters arising in the course of the suit: they are generally awarded on motion, and lie in the discretion of the court which exercises its equitable jurisdiction either in granting or refusing them.

Final costs are given by statute, and depend on the event of the action.

The law applicable to final costs, depends on reasons altogether different from those which govern the costs of interlocutory proceedings by way of motion or summons: to grant or refuse the latter, rests, as has been already pointed out, in the equity and discretion of the court or judge disposing of the application; the former, as they cannot be given without a positive enactment, so neither, when given by such enactment, can they be taken away except by virtue of some power emanating from an enactment equally positive.

The easiest and simplest mode of treating the subject of costs is to consider — first, the common law regarding them; second, the enactment by which plaintiffs are entitled to them; third, those by which defendants are so.

First, then, with regard to the state of the common law respecting costs.

The rule adopted by the civil law and all those various codes which have in modern times been copied from it was expressed by that maxim; "*victus victori in expensis damnandus est.*" And so consistent does it seem with right and justice that the prevailing party should be reimbursed by the defeated one, the costs occasioned by the latter's obstinate resistance to a well-grounded claim or vexatious prosecution of an unjust demand, that it is not easy to conceive how a contrary rule could have been adopted, even by a people so uncultivated as our ancestors. The true reason will perhaps be found in the great simplicity of the proceedings in those early times when there was little or no personal property, few or no contracts, and all trials concerned the ownership of land. When a court was to be found in every manor of which the lord was himself judge, and where the neighboring freeholders constituted both witnesses and jury, little or no expense could have been incurred, and there was, consequently, little or no necessity for reimbursement. Some checks indeed there were, even in those times, on vexatious litigation, for a fine was imposed on the plaintiff if he failed, as a punishment for his unjust prosecution; while, on the other hand, the jury usually were directed in assessing damages

against the defendant to take into consideration the expense to which the plaintiff had been wrongfully subjected through his obstinacy. However, when forms became less simple, and litigation more expensive, it was found necessary to adopt some more certain means of indemnifying the successful party. The Legislature, therefore, interfered, and this brings us to the consideration of those Acts of Parliament from which a plaintiff's right to costs derives its origin.

The first of these took place during the reign of that great improver of all branches of English law, Edward I. The Statute of Gloucester passed in the sixth year of his reign, c. 1, provides in its second section, "that the demandant shall recover against the tenant the costs of the writ purchased, and that this act shall hold place in all cases where a man recovers damages." A very liberal interpretation was given to this act, the words "costs of the writ purchased" have been held to include the whole costs of the suit of which that writ is the commencement; and though the words "demandant" and "tenant" do not, *prima facie*, appear applicable to personal actions, yet the direction which ensues, "that the statute shall extend to all cases in which a man recovers damages," has been held to extend it to actions of Trespass, Trover, Case, *Assumpsit*, Debt upon Contract, Covenant, Replevin, and Ejectment, in all which the plaintiff is at this day entitled to his costs, by virtue of the Statute of Gloucester.

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We now come to defendants whose interests, in this respect, were not attended to so soon as those of plaintiffs; for previous to the Statute of Gloucester, as has been already mentioned, judges had been in the habit of directing the juries to allow the plaintiff, when successful, some compensation for his costs, in assessing the amount of damages; and it was as a substitute for this that the Statute of Gloucester gave him costs. But the defendant, as he never recovered damages, had of course, never been able to obtain compensation through the medium of the jury; so that the framers of the Statute of Gloucester, who considered themselves as providing a substitute for the antecedent practice of assessing compensation by the jury, took no notice of the case of the defendant, to whom that practice never had extended. Justice and reason were, however, too strongly in his favor to suffer him to be long neglected. Accordingly, by stat. 23 Hen. 8, c. 15, it was directed that in debt, covenant, detinue, and case, the defendant, if the plaintiff should be

nonsuited, or a verdict passed against him, should recover such costs as the plaintiff would have recovered had he been successful: and this statute was extended by stat. 4 Jac. 1 c. 3, to all actions whatever in which the plaintiff if he succeeded, would be entitled to costs; so that by the joint operation of these two statutes, whenever there is a nonsuit, or a verdict for the defendant, he has a right to costs, if the plaintiff would have had a right to them.

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The plaintiff having obtained judgment is, in the ordinary course of things, entitled to issue execution, but there are certain proceedings in the nature of appeals, by means of which the judgment is sometimes rendered ineffectual, and the prevailing party's right to execution superseded.

This may in some cases be done by a writ of *audita querela* which is sued out when a defendant against whom judgment has been given, and who is therefore in danger of execution, or perhaps actually in execution, has some good matter of discharge which has happened since the judgment, and therefore applies to the court to be relieved against the oppression of the plaintiff. It is named from the words with which it commences, stating that the complaint of the defendant hath been heard, and enjoins the court to do justice between him and the plaintiff. However, as the court will now in most of the cases where an *audita querela* used to be sued out, give summary relief on motion, this species of proceeding has fallen into neglect.

A Writ of Error is an original writ issuing out of the Court of Chancery, in the nature as well of a *certiorari* to remove a record from an inferior to a superior court, as of a commission to the judges of such superior court to examine the record, and to affirm or reverse it according to law; and it lies where a party is aggrieved by any error in the foundation, proceeding, judgment, or execution of a suit in a court of record. Co. Litt. 288 b. It is an appeal against the judgment, grounded either on the suggestion of some fact which renders the judgment erroneous, as for instance, when the plaintiff or defendant dies before verdict or interlocutory judgment; or on some error in point of law, apparent on the face of the proceeding. When it is grounded upon the suggestion of a fact, it is mostly brought in at one of the courts at Westminster in which the judgment was given. Such a proceeding is called a writ of error *Coram Vobis*, or if the judgment be one of the king's bench, *Coram Nobis*, on account of its being founded on the record which, in the one

case, remains in the Court of our Lord the King, before the king himself, and in the other case, before the king's justices.

A Writ of Error from either of the three courts at Westminster to a superior court is founded on some defect of law manifest upon the record. By stat. 1 Wm. 4, c. 70, writs of error upon any judgment of the king's bench, common pleas, or exchequer, shall be returnable only before the judges, or judges and barons, as the case may be, of the other two courts, in the exchequer chamber, whence error again lies to the House of Lords, the decision of which is final.

It must be sued out within twenty years after judgment, except indeed in the case of a person being an infant, *feme covert*, *non compos mentis*, in prison, or beyond the seas. It is generally brought by the party against whom the judgment has been given, but may be sued out by a plaintiff to reverse his own judgment, if erroneous, and enable him to bring another action. But the person who brings it must be either party or privy to the judgment or prejudiced by it, and therefore capable of deriving an advantage from its reversal. And if there be one judgment against several, they cannot bring separate writs of error, but must all join in bringing a single one, for otherwise the plaintiff might be harassed by a multiplicity of writs of error.

The writ is sued out of the court of chancery and directed to the person in the court below who has the custody of the record; as, in the king's bench and common pleas, to the lord chief justice; in the exchequer, to the treasurer and barons. It commands the inferior court to certify the record to the court of appeal, and the superior court to examine it and affirm or reverse the judgment according to law. And in order that a writ of error may operate as a stay of execution, it is, unless the court or a judge on special application, order otherwise, necessary that the defendant prosecuting a writ of error, and who is then called plaintiff in error, should put in bail, with two sufficient sureties, to prosecute his writ of error with effect, and also to pay, if the writ of error be non prossed, or the judgment affirmed, all the debt, damages, and costs adjudged upon the former judgment, and all costs and damages to be awarded for the delaying of the execution. These sureties are bound by recognizance in double the sum recovered, except in the case of a penalty, and in the case of a penalty, in double the sum really due and double the costs. Within twenty days after the allowance of the writ of error, the plaintiff in error must get a transcript of the record prepared and examined by the clerk of the

errors of the court in which judgment was given; otherwise his writ of error will be non prossed; this transcript the clerk of the errors must annex to the writ of error, and deliver it when it becomes returnable, to the clerk of the errors in the court of error. After the writ has been returned into the court above, the plaintiff in error may, by stat. 5, Geo. 1, c. 13, move the court of error to amend any defect that he perceives in it; this could not have been done at common law, since the writ of error is the only authority of that court, and no court can at common law amend its own commission; or the defendant in error may move to quash the writ, and will be entitled to his costs if he succeed. It may also abate by the death of the plaintiff in error before errors assigned, or by the marriage of the plaintiff in error, being a woman, or by the death of the chief justice before he has signed his return. If none of these things happen, the plaintiff in error must, within eight days after the delivery of the writ with the transcript annexed, to the clerk of the errors of the court of error, assign errors, otherwise he may be non prossed.

The Assignment of Error is in the nature of a declaration, stating the grounds for imputing error to the record upon which the plaintiff relies. The assignment of errors as well as the subsequent pleadings thereon, must be delivered between the attorneys of the parties litigant: and the plaintiff, having delivered it, may demand a Plea of Joinder in Error, from the opposite party, who must, within twenty days, deliver one or demur, otherwise the judgment will be reversed.

The usual plea or Joinder in Error as it is called, is *in nullo est erratum*, — *Anglice*, and that there is no error in the record; which is in the nature of a demurrer, and refers the whole record to the judgment of the court, or the defendant in error may plead a special plea containing some matter, which confesses that the record is erroneous, but insists that the plaintiff has no right to take advantage of the error, *ex. gr.*, a release of errors, or the Statute of Limitations; to this special plea the plaintiff may either reply or demur, and the defendant may either demur or rejoin to his replication: so that at last, as in the pleadings at the commencement of the suit, an issue, either of law or fact, is joined; which, if of law, is determined on argument, and if fact, is tried by a jury, and judgment given according to the verdict.

The judgment of the court is either to affirm the former judgment; to recall it for error in fact; to reverse it for error in law; that the

plaintiff be barred of his Writ of Error, when a plea of release of errors or of the Statute of Limitations is found for the defendant; or that there be a *venire facias de novo.* And if the judgment be reversed, the court of error will not merely overturn the decision of the court below, but will give such a decision as the court below ought to have given. If it become necessary to enter the judgment of the court of error, it is entered on the original record, which remains in the custody of the court below, which is empowered to award such further proceedings as may be necessary thereon.

When the judgment is affirmed or the writ of error non prossed, the defendant in error is entitled to damages and costs, if after verdict for the plaintiff below, to double costs; and may have execution for them by *ca. sa., fi. fa.* or *elegit.* He is also entitled to interest upon the judgment for the time that execution has been delayed by the writ of error. If judgment be reversed, each party must pay his own costs, and the plaintiff in error will, if execution have been levied upon him, be entitled to a Writ of Restitution, and will be restored to all he has lost.

If the judgment be not reversed, vacated, or set aside, the prevailing party has a right to issue execution. This if the judgment be, as it almost always is, for so much money, is mostly by Writ of *Fieri Facias, Capias ad Satisfaciendum* or *elegit.*

A *fieri facias* is, like the *capias ad satisfaciendum* and *elegit* a judicial writ, and issues out of the court in which the judgment against the defendant was recovered. Except in counties palatine (where it is addressed to the palatine officer), it is directed to the sheriff of the county where the venue in the action was laid, commanding him that of the goods and chattels of the defendant, he cause to be made the sum recovered, and have it before the court on the return day: this being delivered to the sheriff or his deputy, he makes a warrant to one of his officers, or if he be the officer of a county palatine, grants his mandate to the sheriff, who, in his turn issues a warrant to his officer.

At common law a *fieri facias* bound the defendant's goods from the time of its test: so that they might have been taken, no matter into whose hands they had passed, and though sold *bona fide* for a valuable consideration. However, as against purchasers, the goods are now bound only from the time of delivering the writ to the sheriff. If indeed after the delivery of the writ the defendant assign his goods away, except in market overt, the sheriff may take them in execution. Under this writ anything may be seized and

sold that is a chattel belonging to the defendant, except his necessary wearing apparel: the sheriff may sell leases and terms of years belonging to the defendant, *fructus industriales*, such as growing corn, which would go to the executor, and fixtures, when the execution is against a tenant who could have removed them; but he cannot carry away, or sell for the purpose of being carried away, from lands let to farm, any straw, chaff, colders, turnips, manure, compost, ashes, or seaweed in any case whatever: nor any hay, grass, tares, vetches, roots or vegetables; being the produce of such land, and which by any agreement made for the benefit of the landlord, and for which the sheriff shall receive a verbal notice before the sale, ought not to be taken therefrom.

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When the writ becomes returnable, the sheriff may return *fieri feci*, *i.e.*, that he has levied the sum named in the writ, or a part of it, which he is ready to pay to the execution creditor: or that he has taken goods which remain unsold for want of buyers; or *nulla bona*, *i.e.*, that the defendant has no goods within his bailiwick; or any other legal excuse for not levying. If money have been levied, and the sheriff neglect to pay it over, the creditor may obtain it from him either by rule of court or action. If part only be levied, and of course when *nulla bona* is returned, he may have a new execution for the residue; and, if he think proper still to proceed by *fieri facias*, may sue out either an *alias fieri facias* into the same, or a *testatum fieri facias* into any other county. If the return be, that the goods are unsold for defect of buyers, he may have a writ of *venditioni exponas* commanding the sheriff to sell them. And, lastly, if the return be false, an action may be brought against the sheriff.

A *capias ad satisfaciendum* is a writ by which the sheriff is commanded to take the defendant, and him safely keep, so that he may have him in court on the return day to satisfy the plaintiff. This process lies against every one who was not personally privileged against arrest at the commencement of the suit, and against some who were, such as attorneys.

The sheriff must execute it literally according to its terms, and has no power, instead of arresting the defendant, to receive the money due from him, but, if the defendant wish to liberate himself by payment, he must have recourse to the execution creditor, who is bound, on tender of the sum due, to sign a proper authority for his discharge. On the return day of this writ the sheriff generally returns *Cepi corpus et paratum habeo*, *i.e.*, that he has taken the body

of the defendant and has it ready; or that the defendant is so ill that he cannot remove him without danger to his life; or he may return *non est inventus*, *i.e.*, that the defendant is not found within his bailiwick. If the last return be made, the plaintiff may sue out an *Alias Capias* into the same, or a *Testatum Capias* into another county, or he may, if he please, sue out an *Exigi Facias* and proceed to Outlawry.

If the defendant be taken, he either remains in the custody of the sheriff in the county gaol, or is removed by *Habeas Corpus* to the prison of the Superior Court. In either case the law sets so high a value upon the liberty of the subject, that it considers the execution a satisfaction of the judgment as against him; and, therefore, though the defendant had died in prison, or been discharged by privilege of Parliament, the plaintiff's remedy would have been at an end, but for stat. 2 Jac. 1, c. 13 and 21 Jac. 1, c. 24, the former of which gives execution after the privilege of Parliament has ceased, and the latter execution against the deceased's goods and chattels; and if the defendant escape from the sheriff, or be rescued, the plaintiff may have new process to retake him, though he will also in that case have a remedy against the sheriff or gaoler for his dereliction of duty.

An *Elegit* is a writ first given by the statute of Westminster the Second, 13 Ed. 1, c. 18, which enacted that where a debt is acknowledged or recovered in the King's Court, or damages awarded, it shall be in the election of him who sues for such debt or damages, to have a Writ of *Fieri Facias*, or that the sheriff deliver to him all the chattels of the debtor, saving his oxen and beasts of the plough, and a moiety of his land, until the debt be levied by a reasonable price or extent.

This writ of execution against a defendant's land may be had as well after his death as before it. The sheriff, on receiving it, is to empanel a jury who inquire of the goods and chattels of the defendant, and appraise them, and also inquire of his lands and tenements. The goods and chattels are delivered to the plaintiff at the price at which they have been valued by the jury: a mode different from that pursued in executing a *Fieri Facias*, under which the sheriff must sell the goods which he has taken. If the goods and chattels were not sufficient to satisfy the plaintiff's demand, the sheriff was to extend a moiety of the lands, under which term were included reversions and rent-charges belonging to defendant, but copy-holds, rent-seck, advowsons in gross, or glebe belonging to a

parsonage or vicarage were not extendible, nor were lands held in trust so, 29 Car. 2, c. 3, s. 10: though, by that statute, some species of trust property, to which the defendant was entitled at the time of execution sued, might have been extended.

The sheriff was to deliver a moiety of the land to the plaintiff by metes and bounds, giving him, however, in general, only legal possession thereof, and leaving him to obtain the actual possession by ejectment. After the lands had been extended by virtue of this writ, the plaintiff could have no further execution, unless, indeed, he was evicted out of the whole; in which case he might, by statute 32 Hen. 8, c. 3 sue out a *Scire Facias* to obtain one. If, however, he was evicted of part only, he had no remedy, that case not having been provided for in the statute. When the plaintiff had been, by perception of the rents and profits, satisfied his entire demand, the defendant might recover his land again by bringing an ejectment or *Scire Facias ad Computandum* in a Court of law, or by application to a Court of equity, or he might move the Court out of which the execution issued to refer it to the master to take an account of the plaintiff's receipts, and order him to quit possession, if it appeared that his demand was satisfied.

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None of these writs of execution can be sued out after a year and a day from the time of judgment, unless indeed the delay has been caused by the act of the Court, or the consent of the parties. In general, therefore, when that time has elapsed, it is necessary to revive the judgment by a writ of *Scire Facias*, the nature of which will be immediately described.

It has been just remarked, that after the expiration of a year and a day, the plaintiff cannot sue out any of the above Writs of Execution, without reviving his judgment by a writ of *Scire Facias* the reason of which is, that, after so long a space of time, the Court *prima facie* presumes his demand to be satisfied. We will present the reader with a short account of the proceedings by which the revival of a judgment is effected.

A *Scire Facias* is a writ founded upon some matter of record. When brought, as it may be, to repeal a patent, it is an original writ, issuing out of the Court of Chancery; in other cases it is a judicial writ, and is sued out of the Court in which the record on which it is founded happens to be.

It is considered as the commencement of a new action, and has, therefore, been enumerated at the beginning of this treatise,

among Actions Personal. Among the great variety of purposes to which it may be applied, it is here intended to consider only the mode in which it is used, for the purpose of reviving a judgment.

The *Scire Facias* states the judgment recovered by the plaintiff, and that execution still remains to be had, and commands the sheriff to make known to the defendant that he be in Court at the return day, to shew why the plaintiff ought not to have execution. After the judgment has been revived by means of this writ, the plaintiff must take out execution within a year and a day from the revival; for if he do not, or if the defendant happen to die, he cannot afterwards take out execution, but will be forced to bring a new *Scire Facias*.

A *Scire Facias* upon a judgment is necessary, not only when the plaintiff has delayed to take out execution within a year and a day, but also when any new person is to be benefited or charged by the execution of the judgment; for it is a rule that executions, and all other judicial writs, must pursue and correspond with the judgments on which they are founded; therefore, if a judgment be obtained against A, and he die, a writ of execution cannot issue against his executor, for he was no party to the judgment; so, if the plaintiff obtain judgment, and marry, execution cannot issue in favor of her husband, for he is not mentioned in the record. In these and similar cases, a writ of *Scire Facias* is sued out, which recites the facts as they have happened; the judgment given upon that writ includes the new party intended to be benefited or charged, and execution may be afterwards sued out upon that judgment.

2. IN EQUITY[1]

BLACKSTONE, COMMENTARIES, III, 442.

The first commencement of a suit in chancery is by preferring a bill to the lord chancellor, in the style of a petition; "humbly complaining showeth to your lordship your orator A B, that," etc. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts; setting forth the circumstances of the case at length, as some fraud, trust, or hardship; "in tender consideration whereof" (which is the usual language of the bill), "and for that your orator is wholly without remedy at the common

[1] On the history of procedure in equity and its relation to Roman and canon-law procedure, see Langdell, Summary of Equity Pleading, §§ 1–52.

law," relief is therefore prayed at the chancellor's hands, and also process of *subpœna* against the defendant, to compel him to answer upon oath to all the matters charged in the bill. And, if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed, in the nature of an *interdictum* by the civil law, commanding the defendant to cease.

This bill must call all necessary parties, however remotely concerned in interest, before the court; otherwise no decree can be made to bind them; and must be signed by counsel, as a certificate of its decency and propriety. For it must not contain matter either scandalous or impertinent: if it does, the defendant may refuse to answer it, till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court, called a master in chancery; of whom there are in number twelve, including the master of the rolls, all of whom, so late as the reign of Queen Elizabeth, were commonly doctors of the civil law. The master is to examine the propriety of the bill: and if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs; which ought of right to be paid by the counsel who signed the bill.

When a bill is filed in the office of the six clerks, (who originally were all in orders; and therefore when the constitution of the court began to alter, a law was made to permit them to marry,) when, I say, the bill is thus filed, if an injunction be prayed therein, it may be had at various stages of the cause, according to the circumstances of the case. If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course; and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits*, the court will grant an injunction immediately, to continue until the defendant has put in his answer, and till the court shall make some further order concerning it, and when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of *subpœna* is taken out: which is a writ commanding the defendant

to appear and answer to the bill, on pain of 100 *l.* But this is not all; for if the defendant, on service of the *subpœna*, does not appear within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt;* and the respective processes of contempt are, in successive order, awarded against him. The first of which is an *attachment*, which is a writ in the nature of a *capias*, directed to the sheriff, and commanding him to attach, or take up, the defendant, and bring him into court. If the sheriff returns that the defendant *non est inventus*, then an *attachment with proclamations* issues, which, beside the ordinary form of attachment, directs the sheriff, that he cause public proclamations to be made, throughout the country, to summon the defendant upon his allegiance, personally to appear and answer. If this be also returned with a *non est inventus*, and he still stands out in contempt, a *commission of rebellion* is awarded against him, for not obeying the king's proclamations according to his allegiance; and four commissioners therein named, or any of them, are ordered to attach him wheresoever he may be found in Great Britain, as a rebel and contemner of the king's laws and government, by refusing to attend his sovereign when thereunto required: since, as was before observed, matters of equity were originally determined by the king in person, assisted by his council; though that business is now devolved upon his chancellor. If upon this commission of rebellion *a non est inventus* is returned, the court then sends a *sergeant-at-arms* in quest of him; and if he eludes the search of the sergeant also, then a *sequestration* issues to seize all his personal estate, and the profits of his real, and to detain them, subject to the order of the court. Sequestrations were first introduced by Sir Nicholas Bacon, lord keeper in the reign of queen Elizabeth; before which the court found some difficulty in enforcing its processes and decrees. After an order for a sequestration issued, the plaintiff's bill is to be taken *pro confesso*, and a decree to be made accordingly. So that the sequestration does not seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the Fleet or other prison till he puts in his appearance or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. For the same kind of process (which

was also the process of the court of star-chamber till its dissolution) is issued out in all sorts of contempts during the progress of the cause if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by *distringas*, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court. And if a peer is a defendant, the lord chancellor sends a *letter missive* to him to request his appearance, together with a copy of the bill; and if he neglects to appear, then he may be served with a *subpœna;* and if he continues still in contempt, a sequestration issues out immediately against his lands and goods, without any of the mesne process of attachments, etc., which are directed only against the person, and therefore cannot affect a lord of parliament. The same process issues against a member of the house of commons, except that the lord chancellor sends him no letter missive.

The ordinary process before mentioned cannot be sued out till after the service of the *subpœna*, for then the contempt begins; otherwise he is not presumed to have notice of the bill; and therefore by absconding to avoid the *subpœna* a defendant might have eluded justice till the statute 5 Geo. II. c. 25, which enacts that where the defendant cannot be found to be served with process of *subpœna*, and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff, which is to be inserted in the London *Gazette*, read in the parish church where the defendant last lived, and fixed up at the royal exchange; and, if the defendant doth not appear upon that day, the bill shall be taken *pro confesso*.

But if the defendant appears regularly, and takes a copy of the bill, he is next to *demur*, *plead* or *answer*.

A demurrer in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court, whether the defendant shall be bound to answer the plaintiff's bill; as for want of sufficient matter of equity therein contained; or where the plaintiff, upon his own showing, appears to have no right; or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehavior. For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed: if the demurrer be overruled, the defendant is ordered to answer.

A plea may be either to the *jurisdiction*, showing that the court has no cognizance of the cause, or to the *person*, showing some disability in the plaintiff, as by outlawry, excommunication, and the like: or it is in *bar;* showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove, if put upon it by the plaintiff. But as bills are often of a complicated nature, and contain various matter, a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal *minutiæ* in the pleadings will be here allowed; for the parties are at liberty, on the discovery of any errors in form, to amend them.

An answer is the most usual defense that is made to a plaintiff's bill. It is given upon oath, or the honor of a peer or peeress: but where there are amicable defendants, their answer is usually taken without oath, by consent of the plaintiff. This method of proceeding is taken from the ecclesiastical courts, like the rest of the practice in chancery; for there, in almost every case, the plaintiff may demand the oath of his adversary in supply of proof. Formerly this was done in those courts with compurgators, in the manner of our waging of law; but this has been long disused and instead of it, the present kind of purgation, by the single oath of the party himself, was introduced. This oath was made use of in spiritual courts, as well in criminal cases of ecclesiastical cognizance as in matters of civil right; and it was then usually denominated the oath *ex officio:* whereof the high commission court in particular made a most extravagant and illegal use; forming a court of inquisition, in which all persons were obliged to answer in cases of bare suspicion, if the commissioners thought proper to proceed against them *ex officio* for any supposed ecclesiastical enormities. But when the high commission court was abolished by statute 16 Car. I. c. 11, this oath *ex officio* was abolished with it, and it is also enacted, by statute 13 Car. II. st. 1, c. 12, "that it shall not be lawful for any bishop or ecclesiastical judge to tender to any person the oath *ex officio*, or any other oath, whereby the party may be charged or compelled to confess, accuse, or purge himself of any criminal matter." But this does not extend to oaths in a civil suit; and therefore it is still the practice, both in the spiritual courts and in equity, to demand the personal answer of the party himself upon oath. Yet if in the bill any question be put that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer.

If the defendant lives within twenty miles of London, he must be sworn before one of the masters of the court: if farther off, there may be a *dedimus potestatem*, or commission to take his answer in the country, where the commissioners administer him the usual oath; and then, the answer being sealed up, either one of the commissioners carries it up to the court, or it is sent by a messenger, who swears he received it from one of the commissioners, and that the same has not been opened or altered since he received it. An answer must be signed by counsel, and must either deny or confess all the material parts of the bill; or it may confess and avoid, that is, justify or palliate the facts. If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray anything in this his answer but to be dismissed the court; if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a *cross-bill*.

After answer put in, the plaintiff upon payment of costs may amend his bill, either by adding new parties or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill. But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue; for afterwards, if new matter arises, which did not exist before, he must set it forth by a *supplemental-bill*. There may be also a bill of *revivor* when the suit is abated by the death of any of the parties; in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise a bill of *interpleader*; where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties to whom upon hearing the court shall decree it to be due. But this depends upon circumstances; and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may proceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true, in every point. Otherwise the course is for the plaintiff to reply generally to the answer, averring his bill to be true, certain, and sufficient, and the

defendant's answer to be directly the reverse; which he is ready to prove as the court shall award; upon which the defendant rejoins, averring the like on his side: which is joining issue upon the facts in dispute. To prove which facts is the next concern.

This is done by examination of witnesses, and taking their *depositions* in writing, according to the manner of civil law. And for that purpose *interrogatories* are framed, or questions in writing; which, and which only, are to be proposed to, and asked of, the witnesses in the cause. These interrogatories must be short and pertinent: not leading ones (as, "did not you see this?" or, "did not you hear that?"); for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purposes of examining witnesses in or near London, there is an examiner's office appointed; but for such as live in the country, a commission to examine witnesses is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skilful interpreters. And it hath been established that the depositions of a heathen who believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.

The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them until published in the court of chancery; and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpœna*, as in the courts of common law, to appear and submit to examination. And when their depositions are taken, they are transmitted to the court with the same care that the answer of a defendant is sent.

If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law, and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity: and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end, without

proceeding to any decree, no relief being prayed by the bill: but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in chancery.

When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication; after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing, which may be done at the procurement of the plaintiff, or defendant, before either the lord chancellor or the master of the rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit, and the arrear of causes depending before each of them respectively. Concerning the authority of the master of the rolls, to hear and determine causes, and his general power in the court of chancery, there were (not many years since) divers questions, and disputes very warmly agitated; to quiet which, it was declared by statute 3 Geo. II. c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the great seal alone, should be deemed to be valid; subject, nevertheless to be discharged or altered by the lord chancellor, and so as they shall not be enrolled, till the same are signed by his lordship. Either party may be *sub-pœnaed* to hear judgment on the day so fixed for the hearing; and then, if the plaintiff does not attend, his bill is dismissed with costs; or, if the defendant makes default, a decree will be made against him, which will be final, unless he pays the plaintiff's cost of attendance and shows good cause to the contrary on a day appointed by the court. A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a non-suit at law, if he suffers three terms to elapse without moving forward in the cause.

When there are cross-causes, on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened, or briefly abridged, and the defendant's answer also, by the junior counsel on each side; after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom; and then such depositions as are called for by the plaintiff are read by one of the six clerks, and the plaintiff may also read such part of

the defendant's answer as he thinks material or convenient: and after this, the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer; and the counsel for the plaintiff are heard in reply. When all are heard, the court pronounces the *decree*, adjusting every point in debate according to equity and good conscience; which decree being usually very long, the minutes of it are taken down, and read openly in court by the registrar. The matter of costs to be given to either party is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II. c. 6) according to the circumstances of the case, as they appear more or less favorable to the party vanquished. And yet the statute 15 Hen. VI. c. 4 seems expressly to direct, that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court.

The chancellor's decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions, that it will not bind the parties thereby, but usually directs the matter to be tried by jury; especially such important facts as the validity of a will, or whether A is the heir at law of B, or the existence of a *modus decimandi*, or real and immemorial composition for tithes. But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of king's bench, or at the assizes, upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff by a fiction declares that he laid a wager of 5 *l.* with the defendant that A was an heir at law to B; and then avers that he is so; and therefore demands the 5 *l.* The defendant admits the feigned wager, but avers that A is not the heir to B; and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans; and are also frequently used in the courts of law, by consent of the parties, to determine some disputed rights without the formality of pleading, and thereby to save much time and expense in the decision of a cause.

So, likewise, if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life or in tail

is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the court of king's bench or common pleas, upon a case stated for that purpose, wherein all the material facts are admitted, and the point of law is submitted to their decision; who thereupon hear it solemnly argued by counsel on both sides, and certify their opinion to the chancellor. And upon such certificate the decree is usually founded.

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, encumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always, by the decree on the first hearing, referred to a master in chancery to examine, which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disproved, and overruled; or otherwise is confirmed, and made absolute, by order of the court.

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree is made; the performance of which is enforced (if necessary) by commitment of the person, or sequestration of the party's estate. And if by this decree either party thinks himself aggrieved, he may petition the chancellor for a *rehearing;* whether it was heard before his lordship, or any of the judges sitting for him, or before the master of the rolls. For, whoever may have heard the cause, it is the chancellor's decree, and must be signed by him before it is enrolled; which is done of course unless a rehearing is desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the rehearing, all the evidence taken in the cause, whether read before or not, is now admitted to be read; because it is the decree of the chancellor himself, who now only sits to hear reasons why it should not be enrolled and perfected; at which time all omissions of either evidence or argument may be supplied. But, after the decree is once signed and enrolled, it cannot be reheard or rectified but by bill of review, or by appeal to the house of lords.

A bill of *review* may be had upon apparent error in judgment appearing on the face of the decree; or, by special leave of the court, upon oath made of the discovery of new matter or evidence,

which could not possibly be had or used at the time when the decree passed. But no new evidence or matter then in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.

An appeal to parliament, that is, to the house of lords, is the *dernier ressort* of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court; and it is effected by *petition* to the house of peers, and not by *writ of error*, as upon judgments at common law. This jurisdiction is said to have begun in 18 Jac., I., and it is certain that the first petition, which appears in the records of parliament, was preferred in that year; and that the first which was heard and determined (though the name of appeal was then a novelty) was presented a few months after; both levelled against the lord chancellor Bacon for corruption and other misbehavior. It was afterwards warmly controverted by the house of commons in the reign of Charles the Second. But this dispute is now at rest: it being obvious to the reason of all mankind, that, when the courts of equity became principal tribunals for deciding causes of property, a revision of their decrees (by way of appeal) became equally necessary as a writ of error from the judgment of a court of law. And upon the same principle, from decrees of the chancellor relating to the commissioners for the dissolution of chauntries, etc., under the statute 37 Hen. VIII. c. 4, (as well as for charitable uses under the statute 43 Eliz. c. 4.) an appeal to the king in parliament was always unquestionably allowed. But no new evidence is admitted in the house of lords upon any account; this being a distinct jurisdiction: which differs it very considerably from those instances, wherein the same jurisdiction revises and corrects its own acts, as in rehearings and bills of review. For it is a practice unknown to our law, (though constantly followed in the spiritual courts,) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence that was never produced below. And thus much for the general method of proceeding in the courts of equity.

CHAPTER VIII

RIGHTS [1]

Justice requires a harmonizing or a balancing of many conflicting interests so as to permit the fullest development and exercise of human powers and capacities with the least injury to the several interests. In general, the interests which a legal system ought thus to harmonize or balance are social, public, and private. Social interests are maintained chiefly and until very recent times almost entirely by the criminal law. Public interests are maintained in the Anglo-American legal system primarily by private actions given to the state or to public officers on behalf of the state, on the analogy of private rights, by private actions allowed to individuals, by the so-called prerogative writs, such as *mandamus* and *quo warranto*, and by the criminal law. Private interests are maintained by rights, powers, and privileges conferred upon individuals and vindicated by private actions in the courts. Rightly or wrongly, our Anglo-American legal system is intensely individualist. It conceives that a paramount public and social interest is in the securing to each individual his private rights, that is, those capacities of action and powers of influencing others through the force of the state which are requisite to secure and protect certain spheres of interest upon which his individual activities depend or about which they center.

PAULSEN, ETHICS (Thilly's translation) 633–637.

The legal spheres, as we noticed before, correspond to the great spheres of action or the circles of interests, for the protection of which the legal order exists. The first and narrowest sphere of interests is that which we may embrace under the heading, *body and life*. Encroachments upon this domain are made by homicide, disfigurement, assault and battery, and all attacks upon life and health. Protection against such crimes forms an important part of all law; in the oldest legal systems it occupies the most conspicuous place. The laws of the ancient Germanic races, for example, consist largely in the determination of the amount of blood-money to be paid for every kind of injury against body and life. If we mean by encroachments upon this domain only physical assaults, then the law seems to leave no room for infractions. In fact,

[1] Holland, Jurisprudence, Chaps. VII, VIII; Markby, Elements of Law, §§ 146–153; Salmond, Jurisprudence, §§ 70–73; Korkunov, General Theory of Law (Hastings' translation) § 29.

however, every hurt is directed against body and life, and so boundless opportunity is offered for unpunishable offences against others: such as causing them annoyance, arousing their anger or grief, exploiting and defrauding them. This is what the Gospel has to say in the matter: "Whosoever hateth his brother is a murderer."

A second sphere of interests is bounded by the *family*, the expanded individual life. Encroachments upon this domain are made by adultery, abduction, substitution of children, seduction, and similar crimes. The more pronounced and tangible forms of such offences are reached by the criminal law; the more subtle forms of disturbing the peace of the home and the family, tale-bearing, intriguing, by which husbands are estranged from their wives and parents from their children, do not come within the reach of the law; think of Othello's friend, Iago!

A third sphere of interests is defined by *property*, which includes the sum-total of external means of self-preservation and voluntary action. Encroachments upon this field are made by robbery, theft, blackmail, fraud, forgery, embezzlement, usury, and all such offences as come under the head of crimes against property. Here again the criminal law cannot reach the more subtle methods by which property is illegitimately acquired at others' expense. In spite of the efforts of the law to punish the offenders, the inventive genius of the lower and higher criminal classes always outwits the law.

As a fourth sphere of interests may be mentioned *honor*, or ideal self-preservation. Encroachments upon this domain are made by insults, false reports, slander. In these cases, much more than in the preceding ones, the criminal law can reach only the more flagrant and careless, but not the more subtle and shrewd violations, which are not the less injurious. There are a thousand anonymous, indirect, undiscoverable ways of blasting a man's reputation for which a penal formula never can be found.

The fifth sphere of interests is the *free exercise of volition*. Attacks upon the liberty of others are made by kidnapping, illegal arrests, compulsion, threats. Breaches of domestic peace may also be placed in this list. In the primitive legal codes protection was afforded against this class of offences by threatening with punishment every one who made a slave of a fellow, contrary to the law. Legal slavery and serfdom no longer exist among us. Yet even in our day forms of dependence are not wanting which closely resemble actual slavery. We may regard the laws which have

been enacted for the protection of labor during the last half century as a continuation of the legislation in defense of individual liberty against new forms of slavery. No one enjoys freedom in the full sense of the term whose life and strength are utilized merely as means to others' ends. Hence, whoever uses men in this way, or attempts to reduce them to such a state or to keep them in it, acts contrary to the law of justice, which demands that the freedom of others be respected.

Finally, we may also add a sixth sphere of interests, which is closely connected with the fourth and fifth, the *spiritual life*, which expresses itself in convictions, views, beliefs, religion, morality, and habits of life. Persecutions, aspersions, open or concealed signs of contempt, scornful neglect, importunate attempts at conversion, are some of the forms of interference with this field. The inner state which tends to such forms of injustice, we are in the habit of calling *intolerance*. It has its natural roots partly in man's dependence and need of society, the gregarious instinct, partly in his arrogance and the conceited belief in his own infallibility. The majority of men are sure of their ground only when their fellows are going in the same direction, thinking the same thoughts. Hence, they demand that everybody accommodate himself to them. Deviations from the common rule are regarded as disturbances and give offence, and hence all means are employed that seem suited either to bring the dissenter into harmony with his fellows or to remove him from view, and to deter others from imitating his example. Arrogance has the same effect upon the leaders of the masses. They regard it as an intolerable presumption on the part of an individual to refuse to follow their leadership, for does he not thereby tacitly accuse the appointed authorities of error? What would happen if everybody were to dare such a thing? An example must therefore be made. The opposite habit of mind is called *toleration; liberality of mind* would perhaps be a more appropriate term. A liberal education shows itself in the ability to understand and to recognize what is strange and different. It is acquired only by frequent contact with the extraordinary, be it personal, literary, or historical. In narrow spheres the mind remains narrow; nations, classes, scholastic sects, religious communities, which live for themselves and scarcely come in contact with the customs and opinions of others, are universally conspicuous for their intolerance.

This is a field in which the law is most powerless. It can reach violations only when they can be construed as libels, which is

not always the case. And yet such offences may cause serious injury; even mere intrusive attempts at conversion ultimately become unbearable. The law is powerless against them. Nevertheless, *toleration* is not a favor, but a right: morally, every one has the right to demand that we do not interfere with his habits, his convictions, and his thoughts if he is determined to adhere to them; and it is a duty to respect this right, provided, of course, the individual's behavior does not violate the rights of others. I have the right to win over others to my ways of thinking and acting, only by example and by means of persuasion, and in the latter case I must respect the rights of others to their own opinions. — The difficulty arises with the question: To what extent have tastes, habits, assertions, opinions of which we cannot morally approve, a claim to toleration, that is, to what extent shall we concede to them equal rights? It is obvious that I have not the right to censure or to express my contempt for every statement which cannot be justified morally, or which does violence to my moral sense or taste. And it is equally obvious that I am not bound in duty to allow everything to pass without contradiction: it may be in the highest measure justifiable to express my contempt openly. Here again no formula can be given which will enable us to decide each particular case.

The law maintains and protects the foregoing interests by recognizing or creating certain duties, rights, powers, and privileges. Duties may be moral or legal. A moral duty exists where one is bound to do or not to do something because of some interest, social, public, or private, recognized by the moral sentiment of the community. A legal duty exists where one is bound to do or not to do something because of some interest, social public, or private, which the law undertakes to maintain through the power of the state invoked in judicial proceedings. For the most part legal duties are correlative to legal rights, public or private. But there are many absolute duties, that is, duties imposed for the maintenance of purely social interests without regard to any corresponding public or private right. These absolute duties are enforced by the criminal law. The chief means which the law adopts, however, in order to attain its end, is the recognition or definition of certain capacities in persons of influencing the actions of others. The courts give effect to these capacities of influence by protecting those in whom they reside in the exercise of them, or by enforcing them against those against whom they are conferred, or by vindicating them by some form of redress when they are interfered with. These capacities of influence are called rights. If the capacity which one has of influencing the acts of others because of some interest which requires others to act or not to act in a particular way, has behind it simply the moral sentiment of the community, we speak of it as a moral right. When such capacity is recognized or created by law and the power of the state may be invoked through the courts in order to give effect to it, we speak of it as a legal

right. When we think that such a capacity ought to exist and ought to be recognized, and made effective by law, we speak of a "natural" right.

Corresponding to every right there is a duty, moral or legal, according as the right is moral or legal. The person to whom the capacity of influencing others for the security of some interest is given, or in whom it is recognized, has a right; the person or persons upon whom that influence may be exerted have duties. A power is a capacity conferred or recognized by law of creating, divesting, or altering rights and so creating or altering duties. It may be conferred by the law directly or indirectly through recognizing a power conferred by one person upon another. Thus, an agent has a power of binding his principal by acts within the apparent scope of his authority, that is, of creating rights in others against his principal and corresponding duties in the principal, which is conferred upon all agents by law. But he has also a power of binding the principal by acts within the scope of the authority given by the principal which the law confers indirectly by recognizing such capacities in agents when principals have entrusted them therewith.

A privilege is an immunity from liability for what, but for the privilege, would be a violation of duty. Privileges may be created directly by the law because of some social or public interest which may be maintained best by exemption of certain persons or certain classes of acts or acts on certain occasions from the operation of general rules of law. For example, what would ordinarily be actionable as a libel because of its effect upon the reputation of the subject of the writing, may be privileged and hence involve no liability when written in criticism of the official acts of a public officer, since the public interest in free criticism in such cases requires a deviation from the general rule. Privileges may be conferred also by individuals whose rights are concerned, and in such cases are usually afforded legal recognition. An example may be seen in the case of a license by the owner of land, as, for instance, leave to another to hunt thereon.

AUSTIN, JURISPRUDENCE (3 Ed.), I, 407.

Duty is the basis of Right. That is to say, parties who have rights, or parties who are invested with rights, have rights to acts, or forbearances enjoined by the sovereign upon other parties.

Or (in other words) parties invested with rights are invested with rights, because other parties are bound by the command of the sovereign, to do or perform acts; or to forbear or abstain from acts.

In short, the term "right" and the term "relative duty" signify the same notion considered from different aspects. Every right supposes distinct parties: A party commanded by the sovereign to do or to forbear, and a party towards whom he is commanded to do or to forbear. The party to whom the sovereign expresses or intimates the command, is said to lie under a duty: that is to say, a relative duty. The party towards whom he is commanded to do or to forbear, is said to have a right to the acts or forbearances in question.

HOLLAND, JURISPRUDENCE, chap. 7.

What then is a "legal right?" But first, what is a right generally?

It is one man's capacity of influencing the acts of another by means, not of his own strength, but of the opinion or the force of society. When a man is said to have a right to do anything, or over anything, or to be treated in a particular manner, what is meant is that public opinion would see him do the act, or make use of the thing, or be treated in that particular way, with approbation, or at least with acquiescence; but would reprobate the conduct of anyone who should prevent him from doing the act, or making use of the thing, or should fail to treat him in that particular way.

A "right" is thus the name given to the advantage a man has when he is so circumstanced that a general feeling of approval, or at least of acquiescence, results when he does or abstains from doing certain acts, and when other people act or forebear to act in accordance with his wishes, while a general feeling of disapproval results when any one prevents him from so doing or abstaining at his pleasure, or refuses to act in accordance with his wishes. . . .

Jurisprudence is specifically concerned only with such rights as are recognized by law and enforced by the power of a state. We may therefore define a "legal right," in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others. . . .

It may be as well to re-state in a few words precisely what we mean by saying that any given individual has "a right."

If a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the "might" so to carry out his wishes.

If, irrespectively of having or not having this "might," public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing; then he has a "moral right" so to carry out his wishes.

If, irrespectively of his having, or not having, either the might, or moral right on his side, the power of the state will protect him in so carrying out his wishes, and will compel such acts and forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a "legal right" so to carry out his wishes.

If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the state to exert its force on his behalf. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the state. The whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, Law exists, as was stated previously, for the definition and protection of rights.

Every right, whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right. Wherever any one is entitled to such furtherance on the part of others, such furtherance on their part is said to be their "duty."

Where such furtherance is merely expected by the public opinion of the society in which they live, it is their "moral duty."

Where it will be enforced by the power of the State to which they are amenable, it is their "legal duty."

The correlative of might is necessity, or susceptibility to force; of moral right is moral duty; of legal right is legal duty. These pairs of correlative terms express, it will be observed, in each case the same state of facts viewed from opposite sides.

A state of facts in which a man has within himself the physical force to compel another to obey him, may be described either that A has the might to control B, or that B is under a necessity of submitting to A. So when public opinion would approve of A commanding and of B obeying, the position may be described either by saying that A has a moral right to command or that B is under a moral duty to obey. Similarly, when the State will compel B to carry out, either by act or forbearance, the wishes of A, we may indifferently say that A has a legal right, or that B is under a legal duty.

SALMOND, JURISPRUDENCE, sec. 72.

A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong.

All that is right or wrong, just or unjust, is so by reason of its effects upon the interests of mankind, that is to say, upon the various

elements of human well-being, such as life, liberty, health, reputation, and the uses of material objects. If any act is right or just, it is so because and in so far as it promotes some form of human interest. If any act is wrong or unjust, it is because the interests of men are prejudicially affected by it. Conduct which has no influence upon the interests of anyone has no significance either in law or morals.

Every wrong, therefore, involves some interest attacked by it, and every duty involves some interest to which it relates, and for whose protection it exists. The converse, however, is not true. Every attack upon an interest is not a wrong, either in fact or in law, nor is respect for every interest a duty, either legal or natural. Many interests exist *de facto* and not also *de jure;* they receive no recognition or protection from any rule of right. The violation of them is no wrong, and respect for them is no duty. For the interests of men conflict with each other, and it is impossible for all to receive rightful recognition. The rule of justice selects some for protection, and the others are rejected.

The interests which thus receive recognition and protection from the rules of right are called rights. Every man who has a right to anything has an interest in it also, but he may have an interest without having a right. Whether his interest amounts to a right, depends on whether there exists with respect to it a duty imposed upon any other person. In other words, a right is an interest the violation of which is a wrong.

Every right corresponds to a rule of right, from which it proceeds, and it is from this source that it derives its name. That I have a right to a thing means that it is right that I should have it. All right is the right of him for whose benefit it exists, just as all wrong is the wrong of him whose interests are affected by it. . . .

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognized and protected by the rule of natural justice — an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognized and protected by the rule of legal justice — an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty. "Rights," says Ihering, "are legally protected interests." . . .

It should be noticed that in order that an interest should become a legal right, it must obtain not merely legal protection, but also

legal recognition. The interests of beasts are to some extent protected by the law, inasmuch as cruelty to animals is a criminal offense. But beasts are not for this reason possessed of legal rights. The duty of humanity so enforced is not conceived by the law as a duty towards beasts, but merely as a duty in respect of them. There is no bond of legal obligation between mankind and them. The only interest and the only right which the law recognizes in such a case is the interest and right of society as a whole in the welfare of the animals belonging to it. He who illtreats a child violates a duty which he owes to the child, and a right which is vested in him. But he who illtreats a dog breaks no *vinculum juris* between him and it, though he disregards the obligation of humane conduct which he owes to society or the State, and the correlative right which society or the State possesses. Similarly, a man's interests may obtain legal protection as against himself, as when drunkenness or suicide is made a crime. But he has not for this reason a legal right against himself. The duty to refrain from drunkenness is not conceived by law as a duty owing by a man to himself, but as one owing by him to the community. The only interest which receives legal recognition is that of society in the sobriety of its members.

HOLLAND, JURISPRUDENCE, chap. 8.

We have next to consider more particularly what is the character of those elements from which a Right results. They are:

(1) A person "in whom the right resides" or who is "clothed with the right," or who is benefited by its existence.

(2) In many cases, an object over which the right is exercised.

(3) Acts or forbearances which the person in whom the right resides is entitled to exact.

(4) A person from whom these acts or forbearances can be exacted; in other words, against whom the right is available; in other words, whose duty it is to act or forbear for the benefit of the subject of the right.

The elements of a legal right may be expressed diagrammatically as follows:

Person { entitled — in whom the power or capacity of influence resides or inheres.
obliged — on whom the corresponding duty falls; toward whom the influence is directed; on whom it operates.

Object { material or corporeal / immaterial or incorporeal } with respect to which it exists and is exercised.

Fact { act / event } which determines its character or scope, gives rise to it, or with reference to which it exists.

In addition to natural rights and legal rights, political rights should also be distinguished. By political rights we mean powers or capacities of taking an active part in the government, which the State concedes to or recognizes in certain classes of citizens. Ancient law did not distinguish legal from political rights. It allowed the former only to those who had the latter. In modern states we may say:

Natural rights belong to or reside in human beings.

Legal or civil rights belong to or reside in persons, natural (*i.e.*, human beings) or juristic (*e.g.*, municipalities, corporations).

Political rights belong to citizens or to those upon whom the State has conferred a partial citizenship.

As the three catagories are not necessarily identical, it follows that possession of one form of rights does not imply possession of the others.

In modern times the law aims to accord civil or legal rights to all natural persons to the extent of their moral or natural rights. The tendency is also to extend political rights as widely as possible. Ancient law limited them and confused them. It conceded no legal rights to the foreigner; if the State gave him partial political rights, that fact gave him partial legal rights also. Today all human beings are persons, *i.e.*, subjects of at least some legal rights. Formerly this was not so.

MARKBY, ELEMENTS OF LAW, sec. 164.

Sometimes a right exists only as against one or more individuals, capable of being ascertained and named; sometimes it exists generally against all persons, members of the same political society as the person to whom the right belongs; or, as is commonly said, somewhat arrogantly, it exists against the world at large. Thus in the case of a contract between A and B, the right of A to demand performance of the contract exists against B only; whereas in the case of ownership, the right to hold and enjoy the property exists against persons generally. This distinction between rights is marked by the use of terms derived from the Latin: the former are called rights *in personam;* the latter are called rights *in rem.*

HOLLAND, JURISPRUDENCE, chap. 9.

A right is available either against a definite person or persons, or against all persons indefinitely. A servant, for instance, has a right to his wages for the work he has done available against a definite

individual, his master; while the owner of a garden has a right to its exclusive enjoyment available against no one individual more than another, but against everybody.

This distinction between rights has been expressed by calling a right of the definite kind a right *in personam*, of the indefinite kind a right *in rem*. And these terms, though not perfectly satisfactory, have obtained a currency which is of itself a recommendation, and moreover are perhaps as good as any substitutes which could be suggested for them. The former term indicates with tolerable perspicuity a right available "*in personam (certam)*," against a definite individual, while the latter implies that the right is capable of exercise over its object, "*in rem*," without reference to any one person more than another.

SCHEME OF RIGHTS IN ANGLO-AMERICAN LAW.

I. *In rem.*
   (1) Personal integrity. The right not to be injured in body or mind by the acts or negligence of others. This extends to (i) life; (ii) body; (iii) health; (a) bodily; (b) mental. Originally the taking of life did not give rise to any civil liability. But modern legislation has given an action to the successors or the estate of the person killed.
   (2) Personal liberty. The right of free motion and locomotion except as restricted by law and restrained lawfully by the proper officers acting in the proper manner.
   (3) Society and control of family and dependents.
   (4) Private property.

II. *In personam.*
   (1) Contractual. Rights arising independently of pre-existing rights out of the agreement of the parties.
   (2) Quasi-contractual. Rights to have restitution or compensation for a benefit conferred, imposed by law in order to prevent unjust enrichment of one party at the expense of another.
   (3) Fiduciary. Rights to have a trust or confidence executed *in specie* (specifically). These rights are recognized only in courts of equity or in proceedings in equity.
   (4) Delictual. Rights to compensation arising from violations of pre-existing rights *in rem*.

BLACKSTONE, COMMENTARIES, I, 129–140.

These [*i.e.*, rights *in rem*] may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property. . . .

I. The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in its mother's womb. . . .

2. A man's limbs (by which for the present we understand only those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right; and they can not be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them. For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. . . .

3. Besides those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating and wounding; though such insults amount not to destruction of life and member.

4. The preservation of a man's health from such practices as may prejudice or annoy it; and

5. The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice; since, without these, it is impossible to have the perfect enjoyment of any other advantage or right. . . .

II. Next to personal security, the law of England regards, asserts and preserves the personal liberty of individuals. This personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct without imprisonment or restraint, unless by due course of law. Concerning which we may make the same observations as upon the preceding article, that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that, in this kingdom, it cannot ever be abridged at the mere discretion of the magistrate, without the express permission of the laws. Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by

legal indictment, or the process of the common law. By the petition of right, 3 Car. I., it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. c. 10, if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council board, or of any of the privy council, he shall, upon demand of his counsel, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the *habeas corpus* act, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required. . . .

The confinement of the person, in any wise, is an imprisonment; so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement, that if a man is under duress of imprisonment, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and, either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a *habeas corpus*. If there be no cause expressed, the jailer is not bound to detain the prisoner; for the law judges in that respect, saith Sir Edward Coke, like Festus, the Roman governor, that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged.

A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so

long as he pleases; and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without license. This may be necessary for the public service and safeguard of the commonwealth. But no power on earth except the authority of parliament, can send any subject of England out of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and, wherever the latter is now inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the great charter declares that no freeman shall be banished, unless by the judgment of his peers, or by the law of the land. And by the *habeas corpus* act, 31 Car. II c. 2 (that second *magna carta*, and stable bulwark of our liberties), it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where they cannot have the full benefit and protection of the common law): but that all such imprisonments shall be illegal. . . .

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though within the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man out of the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. For this might, in reality, be no more than an honorable exile.

III. The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore,

in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none.

So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. In vain it may be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent or that of his representatives in parliament.

TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW, § 350.

The next right to be examined is one which has as yet no name in our law. I shall therefore venture to call it the right of unimpaired pecuniary condition. It is the right not to be subjected to pecuniary loss, not to have the total value of one's belongings reduced. The protected condition of fact which forms the content of the right is the holding of purchasing power, in whatever form it exists, or the being in such a situation that purchasing power in some form will come into one's hands, such an arrangement of circumstances as will bring it to one. In reference to this right all that a person has is looked upon simply with regard to its value, whereas the rights of property, as above described, concern the specific qualities of things. The two conceptions are evidently quite distinct. A thing may be possessed and its physical condition be preserved unimpaired though it has no value whatever; and on the other hand, a given act may be a clear and undoubted violation of the right of property in a thing, though it greatly enhances its value, as if A builds a house upon B's land without the latter's permission, so that the house becomes the property of B, or if he carves B's block of rough marble into a fine statue. Often, however, the two rights overlap, so that the same act is a violation of both, which is the case, for instance, with a tortious taking of property.

Violations of the right of unimpaired pecuniary condition are divided by the civilians into two classes, namely, *damnum emergens*, which is the deprivation of purchasing power that one already has, and *lucrum cessans*, which is the being prevented from acquiring purchasing power that one would otherwise have acquired.

This is not a Property Right. This right is usually confounded with the right of property, at least in so far that violations of it are called violations of the right of property. Blackstone divides the "absolute rights" of persons into the rights of personal security, personal liberty and private property, which last must be meant to include the right now under discussion. This confusion has probably arisen partly from a failure to notice the very important distinction between the deprivation of a right and its violation, which will be more fully discussed in a subsequent chapter, but in relation to which it is sufficient to say here that all protected rights are conclusively presumed to have a pecuniary value, so that the deprivation of a property right or even the preventing of a person from acquiring one will be a violation of the

right of unimpaired pecuniary condition. Indeed even a bare possibility or a permissive or facultative right may have a pecuniary value so that, though such rights are incapable of being violated, the deprivation of them may be a wrong. Another source of confusion is very likely to be found in the use of the word property in a not strictly correct sense to include almost all transferable or actually valuable rights, as will hereafter be explained.

It may perhaps be said that although the right here called that of unimpaired pecuniary condition is plainly not the same as either of the sub-rights described under the head of property, yet it is a part of the right of property in a wider sense and should be placed as a sub-right under that head rather than as an independent right. This brings the question down to a mere matter of nomenclature and arrangement. But even on this ground it is better to keep the two rights separate. Aside from the argument in favor of this view to be drawn from the analysis of the idea of property in the full sense of that word, including the permissive and facultative as well as the protected rights, which will form the subject-matter of the next chapter, there is the important fact that this right has duties specially corresponding to it which are largely different from those which correspond to the right of property, while on the other hand the duties corresponding to the two subdivisions of the latter right, are in the main, the same. Therefore it is almost necessary to have some common name for the latter which shall exclude the former to be used in the definitions of the various duties. This correspondence of duties can be seen by referring to the chapter on Duties Corresponding to Rights *in Rem*, where the various duties are described. Speaking roughly, it may be said that the duties which correspond to the right of unimpaired pecuniary condition are generally duties not to act "maliciously" or fraudulently, while those which correspond to rights of property can be broken by conduct which is simply "negligent," or are even many of them peremptory duties.

This distinction is very clearly brought out in certain cases on trade-marks. A right in a trade-mark is not strictly a property right under the above description, but it is a distinct and separate protected right of the kind that I shall hereafter describe as "abnormal property rights," and is contrasted with and related to the right of unimpaired pecuniary condition in the same manner as true property rights are. Now there are many cases "in which the words or devices used are such as cannot be adopted as a legal

trade-mark, but defendant is, with fraudulent intent, so closely imitating them as to injure plaintiff," and where in so doing he commits a wrong. Thus in *Coffeen* v. *Brunton* it was said: "The complainant has not obtained a patent for his alleged invention. Any other individual has a right to make and sell the same medicine. Nor has the complainant an exclusive right to the label. On neither of these grounds can the complainant claim an injunction; but if there be found in the representations of the defendant that his liniment is the same as the Chinese liniment, which recommends it to the public to the injury of the complainant, it may be ground for the equitable interposition of this court." In such cases there is no special right in the words or device, the special duties corresponding to which can be violated without anything fraudulent in the conduct of the wrong-doer, but merely the general right not to be subjected to pecuniary loss, to which corresponds, among others, the general duty not to make fraudulent misrepresentations

CHAPTER IX

PERSONS [1]

By persons, in law, we mean those entities, natural or artificial, which the law clothes with the power of exercising a legal control over or influence upon the acts of others. Persons are of two classes, natural persons and juristic or artificial persons. In modern law, every human being is recognized as a natural person and hence as a legal person, since modern law allows a legal personality to every natural person. Juristic persons are aggregates of natural persons or of rights or even of objects, which for convenience in certain relations or for certain purposes, the law treats as subjects of legal rights and hence as persons. The most important form is the corporation which may be public — for example, municipalities, such as cities and towns, school districts, sanitary districts, drainage and irrigation districts — or private, including public service companies, such as railway companies, and ordinary business companies.

1. WHEN DOES EXISTENCE BEGIN LEGALLY?

MARKBY, ELEMENTS OF LAW, secs. 131–132.

Persons are human beings capable of rights. To constitute a human being capable of rights two things are necessary, birth and survival of birth.

There are expressions to be found in English law books which look as if the fœtus, or even the embryo, in the mother's womb were capable of rights. Thus we find it said that the unborn child may take by devise or inheritance. But I think the true meaning of this is, not that the unborn child really takes, but that the right is reserved for the child until the moment of its birth.

BLACKSTONE, COMMENTARIES, I, 130.

An infant *in ventre sa mère*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it

[1] Salmond, Jurisprudence, §§ 109–114; Korkunov, General Theory of Law (Hastings' translation) § 28.

were then actually born. And in this point the civil law agrees with ours.

DIETRICH v. NORTHAMPTON, SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1884 (138 Mass. 14).

Holmes, J.: The mother of the deceased slipped upon a defect in a highway of the defendant town, fell, and has had a verdict for her damages. At the time, she was between four and five months advanced in pregnancy, the fall brought on a miscarriage, and the child, although not directly injured, unless by a communication of the shock to the mother, was too little advanced in fœtal life to survive its premature birth. There was testimony, however, based upon observing motion in its limbs, that it did live for ten or fifteen minutes. Administration was taken out, and the administrator brought this action upon the Pub. Sts. c. 52, s. 17, for the further benefit of the mother in part or in whole, as next of kin. The court below ruled that the action could not be maintained; and we are of opinion that the ruling was correct.

The plaintiff founds his argument mainly on a statement by Lord Coke, which seems to have been accepted as law in England, to the effect that if a woman is quick with child, and takes a potion, or if a man beats her, and the child is born alive and dies of the potion or battery, this is murder. 3 Inst. 50. 1 Hawk. P. C. c. 31, s. 16. 1 Bl. Com. 129, 130. 4 Bl. Com. 198. *Beale* v. *Beale*, 1 P. Wms. 244, 246. *Burdet* v. *Hopegood*, 1 P. Wms. 486. *Rex* v. *Senior*, 1 Moody C. C. 346. *Regina* v. *West*, 2 C. & K. 784; S. C. 2 Cox C. C. 500. We shall not consider how far Lord Coke's authority should be followed in this Commonwealth, if the matter were left to the common law, beyond observing that it was opposed to the case in 3 Ass. pl. 2; S. C. Y. B. 1 Ed. III. 23, pl. 18; which seems not to have been doubted by Fitzherbert or Brooke, and which was afterwards cited as law by Lord Hale. Fitz. Abr., Enditement, pl. 4; Corone, pl. 146. Bro. Abr. Corone, pl. 68. 1 Hale P. C. 433.

For even if Lord Coke's statement were the law of this Commonwealth, the question would remain whether the analogy could be relied on for determining the rule of civil liability. Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person. . . . Which again others denied. . . . But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries

received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment.

If it should be argued that an action could be maintained in the case supposed, and that, on general principles, an injury transmitted from the actor to a person through his own organic substance, or through his mother, before he became a person, stands on the same footing as an injury transmitted to an existing person through other intervening substances outside him, the argument in this general form is not helped, but hindered, by the analogy drawn from Lord Coke's statement of the criminal law. For apart from the question of remoteness, the argument would not be affected by the degree of maturity reached by the embryo at the moment of the organic lesion or wrongful act. Whereas Lord Coke's rule requires that the woman be quick with child, which, as this court has decided, means more than pregnant, and requires that the child shall have reached some degree of *quasi* independent life at the moment of the act. *Commonwealth* v. *Parker*, 9 Met. 263. *State* v. *Cooper*, 2 Zabr. 52.

For the same reason, this limitation of criminal liability is equally inconsistent with any argument drawn from the rule as to devises and vouching to warranty, which is laid down without any such limitation, and which may depend on different considerations. Co. Lit. 390*a*, and cases cited. *Reeve* v. *Long*, 1 Salk. 227. *Scatterwood* v. *Edge*, 1 Salk. 229. *Harper* v. *Archer*, 4 Sm. & M. 99.

If these general difficulties could be got over, and if we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and if we should assume also that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted by the question raised by the defendant, whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator. *Marsellis* v. *Thalhimer*, 2 Paige, 35. *Harper* v. *Archer*, *ubi supra*. 4 Kent. Com. 249, n. (b). And this question would not be disposed of by citing those cases where equity has recognized the infant provisionally while still alive *en ventre*. Lutterel's case, stated in *Hale* v. *Hale*, Prec. Ch. 50. *Wallis* v. *Hodson*, 2 Atk. 114, 117.

See *Musgrave* v. *Parry*, 2 Vern. 710. And perhaps not by showing that such an infant was within the protection of the criminal law. Compare 2 Savigny, *System des heutigen Roemischen Rechts*, Beylage III.

The Pub. Sts. c. 207, s. 9 (St. 1845, c. 27, seemingly suggested by *Commonwealth* v. *Parker*, *ubi supra*) punish unlawful attempts to procure miscarriage, acts which of course have the death of the child for their immediate object; and while they greatly increase the severity of the punishment if the woman dies in consequence of the attempt, they make no corresponding distinction if the child dies, even after leaving the womb. This statute seems to us to shake the foundation of the argument drawn from the criminal law, and no other occurs to us which has not been dealt with.

Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning.

2. CIVIL DEATH [1]

BLACKSTONE, COMMENTARIES, I, 132.

These rights of life and member can only be determined by the death of the person; which was formerly accounted to be either a civil or natural death. The civil death commenced, if any man was banished or abjured the realm by the process of the common law, or entered into religion; that is, went into a monastery, and became there a monk professed: in which case he was absolutely dead in law, and his next heir should have his estate. For such banished man was entirely cut off from society: and such a monk, upon his profession, renounced solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society who secluded themselves from it and refused to submit to its regulations. A monk was therefore counted *civiliter mortuus*,

[1] Compare *capitis deminutio* in Roman Law. Moyle, Institutes of Justinian, Excursus I; Muirhead, Historical Introduction to the Private Law of Rome, § 29; Sohm, Institutes of Roman Law (Ledlie's translation) 2 ed., § 35.

and when he entered into religion might, like other dying men, make his testament and executors; or if he made none, the ordinary might grant administration to his next of kin, as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due to the religious, and were liable to the same actions for those due from him, as if he were naturally deceased. Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors, and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due. In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion; for which reason leases, and other conveyances for life, were usually made to have and to hold for the term of one's natural life. But, even in the times of popery, the law of England took no cognizance of profession in any foreign country, because the fact could not be tried in our courts; and therefore, since the Reformation, this disability is held to be abolished: as is also the disability of banishment, consequent upon abjuration, by Statute 21 Jac. I, c. 28.

TOWN OF BALTIMORE v. TOWN OF CHESTER, Supreme Court of Vermont (1881). (53 Vt. 315.)

Veazey, J.: The term civil death, as used in the books, seemed to involve, first, a total extinction of the civil rights and relations of the party, so that he could neither take nor hold property, but his estate passed to his heirs as though he were really dead, or was forfeited to the crown; and of this kind were the cases of monks professed, and abjuration of the realm. . . . Second, an incapacity to hold property, or to sue in the king's courts attended with forfeiture of the estate and corruption of blood; and the king took the property to the exclusion of the heirs. . . .

There were cases in the English law where the party was sentenced to perpetual imprisonment or perpetual banishment for an offense not attended with forfeiture of his estate. . . . And it would seem that perpetual imprisonment or perpetual banishment, without forfeiture of the estate, did not in England produce civil death. . . .

As crimes do not work a forfeiture of the estate or corruption of blood in this State, there is lacking that taint from crime which seems to have constituted, at common law, one of the essential elements of civil death. . . .

We have statutes providing what shall be the effect of imprisonment for crime in certain respects. A life sentence operates as the natural death of a person, so far as it in any way relates to his marriage or the settlement of his estate. Gen. Stats. ch. 120, 19. A sentence for three years or more is a cause for divorce. Ch. 70, 18. For certain purposes the wife is deemed a *feme sole* while the husband is in state prison. Ch. 71, 13. These seem to be all based on the principle that a prisoner's legal rights, subject to his personal restraint, are unaffected by the imprisonment, except as specially provided by statute.

In several states there are statutes providing that persons adjudged to imprisonment for life shall be civilly dead. See *In re Nerac*, 35 Cal. 392, 95 Am. Dec. 111; *Avery* v. *Everett*, 110 N. Y. 317, 6 Am. St. Rep. 368, 1 L. R. A. 264, 18 N. E. Rep. 148.

3. CAPACITY

Complete loss of legal personality must be distinguished from mere incapacity. A person may have rights and yet be incapable of performing legally valid acts or incapable of incurring legal liability or incapable of incurring responsibility for what would otherwise be accounted violations of absolute duties. A person who is civilly dead has lost his legal identity; the old legal personality is extinct, and there is either a new one or none at all in its place. But a person whose legal personality is unaffected may have lost, or may not have attained, legal capacity to act in some or in all cases. Accordingly, we distinguish normal persons, persons of full and complete capacity, and abnormal persons, persons of partial or limited capacity. Ancient law conceded full capacity to comparatively few. Modern law aims to confer full legal capacity as widely as possible, and in general to create legal incapacities only where there are natural incapacities also. The only substantial exception in our modern law is that for historical reasons married women are still under a partial legal incapacity in many jurisdictions. In such jurisdictions they have only a limited power of contracting. With this exception, the legal incapacities recognized in modern law coincide substantially with natural incapacities. In our Anglo-American legal system there are now five conditions which create legal incapacity, total or partial: (1) infancy or minority; (2) coverture, or the condition of being a married woman; (3) idiocy and lunacy or insanity; (4) conviction of treason or felony; (5) alienage.

HOLLAND, JURISPRUDENCE, Chap. XIV.

The chief varieties of status among natural persons may be referred to the following causes: 1. sex; 2. minority; 3. *patria*

potestas and *manus*; 4. coverture; 5. celibacy; 6. mental defect; 7. bodily defect; 8. rank, caste, and official position; 9. race and color; 10. slavery; 11. profession; 12. civil death; 13. illegitimacy; 14. heresy; 15. foreign nationality; 16. hostile nationality. All of the facts included in this list, which might be extended, have been held, at one time or another, to differentiate the legal position of persons affected by them from that of persons of the normal type.

There are three distinct questions in this connection: (1) capacity for legal transactions, that is, for acts intended to produce legal consequences to which the law will attach the intended consequences; (2) capacity for torts (acts involving civil liability for breaches of rights *in rem*); (3) capacity for crimes (breaches of absolute duties involving penal consequences). Capacity for rights is also, in modern law, a wholly distinct question.

4. INFANCY [1]

BLACKSTONE, COMMENTARIES, I, 464.

3. Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise: but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause, and it frequently happens, that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases an infant of the age of fourteen years may be capitally punished for any capital offence: but under the age of seven he cannot. The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offense committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion. And Sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could

[1] See Mack, The Juvenile Court, 23 Harvard Law Rev. 104.

discern between good and evil: and in such cases the maxim of law is, that *malitia supplet aetatem*. So also, in much more modern times, a boy of ten years old, who was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters: but this may be said in general, that an infant shall lose nothing by non-claim, or neglect of demanding his right; nor shall any other laches or negligence be imputed to an infant, except in some very particular cases.

It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract that will bind him. But still to all these rules there are some exceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages: and there are others, a few of which it may not be improper to recite as a general specimen of the whole. And first, it is true, that infants cannot alien their estates: but infant trustees or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint. Also it is generally true, that an infant can do no legal act. An infant may also purchase lands, but his purchase is incomplete: for when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement. It is, further, generally true that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet in some cases he may bind himself apprentice by deed indented or indentures, for seven years; and he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and other necessaries; and likewise for his good teaching and instruction whereby he may profit himself afterwards. And thus much, at present, for the privileges and disabilities of infants.

SNELL, PRINCIPLES OF EQUITY, chap. 22, § 4.

The origin of the jurisdiction of the Court of Chancery over infants has been a matter of much juridical discussion. The better

opinion seems to be, that this jurisdiction has its just and rightful foundation in the prerogative of the Crown, flowing from its general power and duty as *parens patriæ*, to protect those who have no other lawful protector. Partaking, as it does, more of the nature of a judicial administration of rights and duties, in *foro conscientiæ* than of strict executive authority, it would naturally follow, *ea ratione*, that it should be exercised in the Court of Chancery, as a branch of the general jurisdiction originally confided and delegated to that court.

If a bill be filed or action commenced relative to an infant's estate or person, the court acquires jurisdiction, and the infant, whether plaintiff or defendant, and even during the life of its father, or of its testamentary guardian, immediately becomes a ward of the court.

The Court of Chancery will appoint a suitable guardian to an infant where there is none other, or none other who will or can act; but, as a general rule, it will not do so unless where the infant has property, although it may do so under exceptional circumstances. "It is not, however," as observed by Lord Eldon, "from any want of jurisdiction that it does not act where it has no property of an infant, but from a want of the means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so — that is to say, by its having the means of applying property for the use and maintenance of the infant.

In general, parents are intrusted with the custody and education of their children, on the natural presumption that the children will, by their parents, be properly treated, and due care be taken of their education, morals and religion; but if the court has reasonable grounds for believing that the children would not be properly treated, it "would interfere even with parents, upon the principle that preventing justice is preferable to punishing justice." But the court requires a strong case to be made out before it will interfere with a father's guardianship. Accordingly, where the father is insolvent, or his character and conduct are such as are likely to contaminate the morals of his children, or where he is endangering their property or neglecting their education, or is guilty of ill-treatment and cruelty to them, it is not a matter of course to take the father's guardianship away, but if the danger to the children is proximate and serious, then the custody of the children will be committed to a person to act as guardian.

The guardian will be allowed to regulate the mode of, and to select the place for, the education of his ward, whose obedience will be enforced by the court. And the court will aid guardians in obtaining possession of the persons of their wards when they are detained from them.

If the guardian wishes to take his ward out of the jurisdiction of the court, and in some other cases where there is danger of injury to the ward's person or property, the court will always take security from the guardian before sanctioning his removal out of the jurisdiction.

[In the United States the Probate Courts appoint guardians for infants and control their conduct. The jurisdiction of equity therefore, in this matter is really not exercised in most of the States except in the matter of relief against guardians at the suits of infants for their property or estates.] [1]

5. COVERTURE

BLACKSTONE, COMMENTARIES, I, 442.

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a *feme-covert, faemina viro co-operta;* is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord, and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal. For this reason, a man cannot grant anything to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. A woman indeed may be attorney for her husband; for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath anything

[1] The portion in brackets was added by an American editor.

to his wife by will; for that cannot take effect till the coverture is determined by his death. The husband is bound to provide his wife with necessaries by law, as much as himself; and, if she contracts debts for them, he is obliged to pay them; but for anything besides necessaries he is not chargeable. Also if a wife elopes, and lives with another man, the husband is not chargeable even for necessaries; at least if the person who furnishes them is sufficiently apprised of her elopement. If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together. If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued without making the husband a defendant. There is indeed one case where the wife shall sue and be sued as a *feme sole*, viz. where the husband has abjured the realm, or is banished, for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defense at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately; for the union is only a civil union. But in trials of any sort they are not allowed to be witnesses for, or against, each other: partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet;*" and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare.*" But where the offense is directly against the person of the wife, this rule has been usually dispensed with; and therefore, by statute 3 Hen. VII. c. 2, in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife: because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher here would do, if, by forcibly marrying a woman, he could prevent her from being a witness who is perhaps the only witness to that very fact.

In the civil law the husband and the wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries; and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed and acts done by her, during her coverture, are void; except it be a fine or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary. She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion. And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her: but this extends not to treason or murder.

The husband also, by the old law, might give his wife moderate correction. For as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable, in some cases, to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet.* The civil law gave the husband the same, or a larger, authority over his wife: allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem;* for others, only *modicam castigationem adhibere.* But with us, in the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.

DICEY, LAW AND OPINION IN ENGLAND, 373–381.

In 1800 the Court of Chancery had been engaged for centuries in the endeavor to make it possible for a married woman to hold property independently of her husband, and to exert over this property the rights which could be exercised by a man or an unmarried woman. Let it, however, be noted, that the aim of the Court of Chancery had throughout been not so much to increase the property rights of married women generally as to enable a person

(*e.g.* a father) who gave to, or settled property on a woman, to ensure that she, even though married, should possess it as her own, and be able to deal with it separately from, and independently of, her husband, who, be it added, was, in the view of equity lawyers, the "enemy" against whose exorbitant common-law rights the Court of Chancery waged constant war. By the early part of the nineteenth century, and certainly before any of the Married Women's Property Acts, 1870–1893, came into operation, the Court of Chancery had completely achieved its object. A long course of judicial legislation had at last given to a woman, over property settled for her separate use, nearly all the rights, and a good deal more than the protection, possessed in respect of any property by a man or a *feme sole*. This success was achieved, after the manner of the best judge-made law, by the systematic and ingenious development of one simple principle — namely, the principle that, even though a person might not be able to hold property of his own, it might be held for his benefit by a trustee whose sole duty it was to carry out the terms of the trust. Hence, as regards the property of married women, the following results, which were attained only by degrees.

Property given to a trustee for the separate use of a woman, whether before or after marriage, is her separate property — that is, it is property which does not in any way belong to the husband. At common law indeed it is the property of the trustee, but it is property which he is bound in equity to deal with according to the terms of the trust, and therefore in accordance with the wishes or directions of the woman. Here we have constituted the "separate property," or the "separate estate" of a married woman.

If, as might happen, property was given to or settled upon a woman for her separate use, but no trustee were appointed, then the Court of Chancery further established that the husband himself, just because he was at common law the legal owner of the property, must hold it as trustee for his wife. It was still her separate property, and he was bound to deal with it in accordance with the terms of the trust, *i.e.* as property settled upon or given to her for her separate use. The Court of Chancery having thus created separate property for a married woman, by degrees worked out to its full result the idea that a trustee must deal with the property of a married woman in accordance with her directions. Thus the Court gave her the power to give away or sell her separate property, as also to leave it to whomsoever she wished by will, and

further enabled her to charge it with her contracts. With regard to such property, in short, equity at last gave her, though in a roundabout way, nearly all the rights of a single woman. But equity lawyers came to perceive, somewhere towards the beginning of the nineteenth century, that though they had achieved all this, they had not given quite sufficient protection to the settled property of a married woman. Her very possession of the power to deal freely with her separate property might thwart the object for which that separate property had been created; for it might enable a husband to get her property into his hands. Who could guarantee that Barry Lyndon might not persuade or compel his wife to make her separate property chargeable for his debts, or to sell it and give him the proceeds? This one weak point in the defenses which equity had thrown up against the attacks of the enemy was rendered unassailable by the astuteness, as it is said, of Lord Thurlow. He invented the provision, constantly since his time introduced into marriage settlements or wills, which is known as the restraint on anticipation. This clause, if it forms part of the document settling property upon a woman for her separate use, makes it impossible for her during coverture either to alienate the property or to charge it with her debts. Whilst she is married she cannot, in short, in any way anticipate her income, though in every other respect she may deal with the property as her own. She may, for example, bequeath or devise her property by will, since the bequest or devise will have no operation till marriage has come to an end. But this restraint, or fetter, operates only during coverture. It in no way touches the property rights either of a spinster or of a widow. The final result, then, of the judicial legislation carried through by the Court of Chancery was this. A married woman could possess separate property over which her husband had no control whatever. She could, if it was not subject to a restraint on anticipation, dispose of it with perfect freedom. If it was subject to such restraint, she was, during coverture, unable to exercise the full rights of an owner, but in compensation she was absolutely guarded against the possible exactions or persuasions of her husband, and received a kind of protection which the law of England does not provide for any other person except a married woman.

It is often said, even by eminent lawyers, that a married woman was in respect of her separate property made in equity a *feme sole*. But this statement, though broadly speaking true, is not accurate, and conceals from view the fact (which is of importance to a student

who wishes to understand the way in which equity has told upon the form and substance of the Married Women's Property Acts, 1870–1893) that the process of judicial legislation which gave to a married woman a separate estate, led to some very singular results. Three examples will make plain my meaning.

First.—The restraint on anticipation which today, no less than before 1870, is constantly to be found in marriage settlements, has (as already pointed out) given to a married woman a strictly anomalous kind of protection.

Secondly.—Equity, whilst conferring upon a married woman the power to dispose of her separate property by will, gave her no testamentary capacity with respect to any property which was not in technical strictness separate property. . . .

Thirdly.—Equity never in strictness gave a married woman contractual capacity; it never gave her power to make during coverture a contract which bound herself personally. What it did do was this: it gave her power to make a contract, *e.g.* incur a debt, on the credit of separate property which belonged to her at the time when the debt was incurred, and it rendered such separate property liable to satisfy the debt. Hence two curious consequences. The contract of a married woman, in the first place, even though intended to bind her separate property, did not in equity bind any property of which she was not possessed at the moment when she made the contract, *e.g.* incurred a debt. The contract of a married woman, in the second place, if made when she possessed no separate property, in no way bound any separate property, or indeed any property whatever of which she might subsequently become possessed.

. . . . . .

In spite, however, of these anomalies, there would have been little to complain of in the law, with regard to the property of married women, if the Court of Chancery had been able to supersede the common law and to extend to all women on their marriage the protection which the rules of equity provided for any woman whose property was the subject of a marriage settlement. But the way in which equity was developed as a body of rules, which in theory followed and supplemented the common law, made such a thoroughgoing reform, as would have been involved in the superseding of the common law, an impossibility. As regards a married woman's property the two systems of common law and of equity co-existed side by side unconfused and unmingled till the reform introduced

by the Married Women's Property Acts. Hence was created in practice a singular and probably unforeseen inequality between the position of the rich and the position of the poor. A woman who married with a marriage settlement, — that is, speaking broadly, almost every woman who belonged to the wealthy classes, — retained as her own any property which she possessed at the time of marriage, or which came to her, or was acquired by her during coverture. She was also, more generally than not, amply protected by the restraint on anticipation against both her own weakness and her husband's extravagance or rapacity. A woman, on the other hand, who married without a marriage settlement — that is, speaking broadly, every woman belonging to the less wealthy or the poorer classes — was by her marriage deprived of the whole of her income, and in all probability of the whole of her property. The earnings acquired by her own labor were not her own, but belonged to her husband. There came, therefore, to be not in theory but in fact one law for the rich and another for the poor. The daughters of the rich enjoyed, for the most part, the considerate protection of equity, the daughters of the poor suffered under the severity and injustice of the common law.

NEW YORK DOMESTIC RELATIONS LAW, §§ 50, 51.

§ 50. Property, real or personal, now owned by a married woman, or hereafter owned by a woman at the time of her marriage, or acquired by her as prescribed in this chapter, and the rents, issues, proceeds and profits thereof, shall continue to be her sole and separate property as if she were unmarried, and shall not be subject to her husband's control or disposal nor liable for his debts.

§ 51. A married woman has all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried; but a husband and wife can not contract to alter or dissolve the marriage or to relieve the husband from his liability to support his wife. All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not

of record, as if she was single. A married woman may confess a judgment specified in section one thousand two hundred and seventy-three of the code of civil procedure.

6. LUNACY, IDIOCY

BLACKSTONE, COMMENTARIES, I, 304.

A lunatic, or *non compos mentis*, is one who hath had understanding but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals, sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies; or who lose their intellects by disease; those, that grow deaf, dumb, and blind, not being born so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II. c. 10, that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use; and, if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administration) shall now go to their executors or administrators.

On the first attack of lunacy, or other occasional insanity, while there may be hope of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations; and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority by statute 14 Geo. III. c. 49, (continued by 19 Geo. III. c. 15,) for regulating private madhouses. But when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.

The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is intrusted, upon petition or information, grants a commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee.

7. CONVICTION OF FELONY

PRESBURY v. HULL, Supreme Court of Missouri, 1863 (34 Mo. 29.)

Bates, J.: The statute of Missouri which enacts that a sentence of imprisonment in the penitentiary for a term of less than life, suspends all civil rights of the person so sentenced during the term thereof, applies only to sentences in the State courts. We know of no similar act as to sentences by the Federal courts, and without such act there is no such suspension. A sentence for life even would not have the effect of making the convict civilly dead. (*Platner* v. *Sherwood*, 6 John. Chy. 118.) Here the sentence was for one year.

It is of no consequence that Wolff's offense might have been punished by a State court (if it be so); for it is not the fact of criminality which, in any case, suspends his rights, but the conviction and sentence to the penitentiary.

BLACKSTONE, COMMENTARIES, IV, 380, 388.

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is attainder. For when it is now clear beyond all dispute that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed. He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law. This is after judgment;

for there is great difference between a man convicted and attained: though they are frequently, through inaccuracy, confounded together. After conviction only, a man is liable to none of these disabilities; for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favor. Upon judgment, therefore, of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted. The consequences of attainder are forfeiture and corruption of blood.

Another immediate consequence of attainder is the corruption of blood, both upwards and downwards, so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.

[Forfeiture and corruption of blood are now abolished.]

8. ALIENAGE

KENT, COMMENTARIES, II, 53, 61, 63.

We proceed next to consider the disabilities, rights, and duties of aliens.

(1) Disabilities of Aliens. — An alien cannot acquire a title to real property by descent, or created by other mere operation of law. The law *quae nihil frustra* never casts the freehold upon an alien heir who cannot keep it. This is a well-settled rule of the common

law. The right to real estate by descent is governed by the municipal law of the individual states. Nor can an alien take as tenant by the curtesy or in dower. It is understood to be the general rule, that even a natural-born subject cannot take by representation from an alien, because the alien has no inheritable blood through which a title can be deduced. If an alien purchase land, or if land be devised to him, the general rule is, that in these cases he may take and hold, until an inquest of office has been had; but upon his death the land would instantly and of necessity (as the freehold cannot be kept in abeyance), without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent.

Though an alien may purchase land, or take it by devise, yet he is exposed to the danger of being divested of the fee, and of having his lands forfeited to the state, upon an inquest of office found. His title will be good against every person but the state, and if he dies before any such proceeding be had, we have seen that the inheritance cannot descend, but escheats, of course. If the alien should undertake to sell to a citizen, yet the prerogative right of forfeiture is not barred by the alienation, and it must be taken to be subject to the right of the government to seize the land. His conveyance is good as against himself, and he may, by a fine, bar persons in revision and remainder, but the title is still voidable by the sovereign upon office found.

Aliens are capable of acquiring, holding, and transmitting movable property, in like manner as our own citizens, and they can bring suits for the recovery and protection of that property. They may even take a mortgage upon real estate by way of security for a debt, and this I apprehend they may do without any statutory permission, for it has been the English law from the early ages. It is also so held in the Supreme Court of the United States, and that the alien creditor is entitled to come into a court of equity to have the mortgage foreclosed, and the lands sold for the payment of his debt. The question whether the alien in such a case could become a valid purchaser of the mortgaged premises sold at auction at his instance, is left untouched; and as such privilege is not necessary for his security, and would be in contravention of the general policy of common law, the better opinion would seem to be that he could not, in that way, without special provision by statute, become the permanent and absolute owner of the fee.

Even alien enemies, resident in the country, may sue and be sued as in time of peace; for protection to their persons and property is

due and implied from the permission to them to remain, without being ordered out of the country by the President of the United States. The lawful residence does, *pro hac vice*, relieve the alien from the character of an enemy, and entitles his person and property to protection. The effect of war upon the rights of aliens we need not here discuss, as it has been already considered in a former part of this course of lectures, when treating of the law of nations.

During the residence of aliens amongst us, they owe a local allegiance, and are equally bound with natives to obey all general laws for the maintenance of peace and the preservation of order, and which do not relate specially to our own citizens. This is a principle of justice and of public safety universally adopted; and if they are guilty of any illegal act, or involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country.

9. JURISTIC PERSONS [1]

GAREIS, SCIENCE OF LAW (Kocourek's translation) § 15.

There are, however, certain entities which are not human beings and which still have interests to which the law assigns legal protection. In other words, legal systems recognize the possession of rights which are not interests of individual persons but of other entities, or aggregates of persons or property.

It is not necessary that legal systems shall create such interests. The ideals and necessities of mankind recognize them before the law. Legal order under certain conditions invests such interests as are found to exist in fact with the protection necessary to transform such interests into legal advantages. The entities whose preterhuman interests are in such manner protected are called juristic (fictitious, artificial, or moral) persons in contradistinction to natural persons. Juristic persons are either aggregates of persons (*universitates personarum*) or aggregates of things (*universitates rerum*).

Private law recognizes the following classes of juristic persons: —

1. The state, or the governing social entity, in its private legal relations. In this aspect the dominant entity does not authoritatively represent its interests by virtue of its attribute of sovereignty.

[1] Gierke, Political Theories of the Middle Age (Maitland's translation), xviii-xliii; Markby, Elements of Law, §§ 131–135; Salmond, Jurisprudence, §§ 115–120.

Its activity here is the same as that of any free citizen in the state in the satisfaction of private economic necessities. In this activity a state is called the *fiscus*, or treasury, in contradistinction to the activity in which the state represents public interests of the community by sovereign law in the governing sense (*res publica*).

2. Public communities within the state, which represent public interests; thus, municipalities, parishes, towns, provinces and similar communities.

3. Aggregates of persons, such as associations (corporations) arising from joint concurrence or agreement, which have legal interests, in that the law gives them a legal position. According to the conditions of the legal recognition of their juristic personality such corporations (*collegia corpora*) are: guilds and industrial fraternities, and those privileged aggregates of persons which are under state supervision (*collegia sodalicia*); for example, the Roman *collegia funeraticia*, and modern associations for accident, age and health insurance in the German Empire. These associations under state recognition have social objects as opposed to objects of the state or of individuals.

4. Associations for profit (*societates quaestuariae*), which the law specially invests with the capacity for having rights; thus, share companies, registered associations, and mining companies, in the modern law.

5. Churches, churchly associations and institutions.

6. Foundations, that is, complexes of property which are recognized by the law as holders of rights for the accomplishment of certain limited objects: *piae causae*, etc.

KENT, COMMENTARIES, II, 268, 273, 274.

A corporation is a franchise possessed by one or more individuals, who subsist, as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual.

The object of the institution is to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation, and their successors, are considered in law as but one person, capable, under an artificial form, of taking and conveying

property, contracting debts and duties, and of enjoying a variety of civil and political rights. One of the peculiar properties of a corporation is the power of perpetual succession; for, in judgment of law, it is capable of indefinite duration. The rights and privileges of the corporation do not determine or vary, upon the death or change of any of the individual members. They continue as long as the corporation endures.

It is sometimes said that a corporation is an immortal as well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal, that it is well known that most of the private corporations recently created by statute are limited in duration to a few years. There are many corporate bodies that are without limitation, and, consequently, capable of continuing so long as a succession of individual members of the corporation remains and can be kept up.

Corporations are divided into aggregate and sole. A corporation sole consists of a single person, who is made a body corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which as a natural person, he cannot have. A bishop, dean, parson, and vicar are given in the English books as instances of sole corporation; and they and their successors in perpetuity take the corporate property and privileges; and the word "successors" is generally as necessary for the succession of property in a corporation sole, as the word "heirs" is to create an estate of inheritance in a private individual. A fee will pass to a corporation aggregate, without the word "successors" in the grant, because it is a body which, in its nature, is perpetual; but, as a general rule, a fee will not pass to a corporation sole, without the word "successors," and it will continue for the life only of the individual clothed with the corporate character. There are very few points of corporation law applicable to a corporation sole.

Another division of corporations, by the English law, is into ecclesiastical and lay. The former are those of which the members are spiritual persons, and the object of the institution is also spiritual. With us they are called religious corporations. This is the description given to them in the statutes of New York, Ohio, and other states, providing generally for the incorporation of religious societies, in an easy and popular manner, and for the purpose of managing, with more facility and advantage, the temporalities belonging to the church or congregation. Lay corporations are

again divided into eleemosynary and civil. An eleemosynary corporation is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, by public and private donations. Civil corporations are established for a variety of purposes, and they are either public or private. Public corporations are such as are created by the government for political purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are subject to the control of the legislature of the state. They may also be empowered to take or hold private property for municipal uses; and such property is invested with the security of other private rights. So corporate franchises attached to public corporations are legal estates coupled with an interest, and are protected as private property. If the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the instutution. A bank, created by the government for its own uses, and where the stock is exclusively owned by the government, is a public corporation. So a hospital created and endowed by the government, for general purposes, is a public and not a private charity. But a bank whose stock is owned by private persons is a private corporation, though its object and operations partake of a public nature, and though the government may have become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike, and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single person. A hospital founded by a private benefactor is, in point of law, a private corporation, though dedicated by its charter to general charity. A college, founded and endowed in the same manner, is a private charity, though from its general and beneficent objects it may acquire the character of a public institution. If the uses of an eleemosynary corporation be for general charity, yet such purposes will not of themselves constitute it a public corporation. Every charity which is extensive in its object may, in a certain sense, be called a public charity. Nor will a mere act of incorporation change a charity from a private to be a public one. The charter of the

crown, said Lord Hardwicke, cannot make a charity more or less public, but only more permanent. It is the extensiveness of the object that constitutes it a public charity. A charity may be public, though administered by a private corporation. A devise to the poor of a parish is a public charity. The charity of almost every hospital is public, while the corporations are private. To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke.

In England, corporations are created and exist by prescription, by royal charter, and by act of Parliament. With us they are created by authority of the legislature, and not otherwise. There are, however, several of the corporations now existing in this country, civil, religious, and eleemosynary, which owed their origin to the crown under the colony administration. Those charters granted prior to the Revolution were upheld, either by express provision in the constitutions of the states, or by general principles of public and common law of universal reception; and they were preserved from forfeiture by reason of any nonuser or misuser of their powers, during disorders which necessarily attended the Revolution.

CHAPTER X

ACTS

By "events" jurists mean those occurrences which take place independently of human will. By "acts" they mean those which are subject to the control of the human will and so flow therefrom.[1] Acts, then, are exertions of the will manifested in the external world. Acts may have legal consequences because they interfere with interests (social, public, or private) recognized and protected by law, and so involve responsibility for breach of an absolute duty or liability for breach of a duty correlative to some right. In such case, we must ask, has the person in question capacity for responsibility or for liability. In general, our law holds one to liability for infringement of a private right where it would not hold him to responsibility for breach of an absolute duty, as in the case of an insane person, who may be held for a tort (infringement of a private right *in rem*) but not for a crime. Acts may also have legal consequences because such was the intention of the person or persons who performed them, and the law recognizes and gives effect to that intention. Such acts are called legal transactions. They are performed in order to create rights, powers, or privileges, and when done by competent persons and in the prescribed manner, the law recognizes them and carries out the intent. Examples are: conveyances and transfers of rights; contracts; appointments of agents. In general, capacity for legal transactions is limited much more than capacity for responsibility. Thus, an infant over seven years of age may be responsible, and a minor over fourteen but less than twenty-one years of age will be responsible, if no other defect exists. But a minor has no power of entering into valid legal transactions.

Acts intended as legal transactions may be valid, that is, they may be such that the law gives them the effect intended, or they may be void or voidable. If void, they have no legal effect at all. If voidable, they have legal effect unless and until challenged, but they may be attacked for some defect, and, if so, they will fail to produce the intended legal consequences. Acts intended as legal transactions are void where not done in the manner which the law prescribes, or where they seek some end which the law refuses to recognize as legitimate, or where they involve injury to some interest, social or public, which the law regards as more important than the general interest in carrying out the intention of those who performed them. They are voidable chiefly where there is some defect in the capacity of the person who acted or where the intention, to which the law is asked to give effect, is not formed freely or intelligently, or under circumstances

[1] Reference may be made to Holland, Jurisprudence, Chap. VIII; Salmond, Jurisprudence, Chaps. XVII–XIX; Markby, Elements of Law, §§ 203–289; Pollock, First Book of Jurisprudence, Pt. I, Chap. VI.

which make it fair to hold the party thereto. If one was forced or defrauded into a transaction, or entered into it by mistake, there is ground for attacking it as being voidable.

1. REPRESENTATION IN ACTS

HOLLAND, JURISPRUDENCE, Chap. 8.

Most, but not all, juristic acts may in modern times be performed through a representative. A representative whose authority extends only to the communication of the will of his principal is a mere messenger, "*nuntius*." A representative whose instructions allow him to exercise an act of will on behalf of his principal, to act to some extent, as it is said, "at his own discretion," is an "Agent." His authority may be express or implied, and he may, in his dealings with third parties, disclose, or he may not disclose, with different results, the fact that he is acting on behalf of another. The scanty and gradual admission of agency in Roman law is a well-known chapter in the history of that system. The tendency of modern times is towards the fullest recognition of the principles proclaimed in the canon law: "*potest quis per alium quod potest facere per seipsum*"; "*qui facit per alium est perinde ac si faciat per seipsum.*"

BLACKSTONE, COMMENTARIES, I, 429-432.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied: *nam qui facit per alium, facit per se.* Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it: though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution: for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibit, cum prohibere possit, jubet.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master: for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant; but if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up, for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.

If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. But in these cases the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehavior. . . . A master is, lastly, chargeable if any of his family layeth or casteth any thing out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people: for the master hath the superintendence and charge of all his household. And this also agrees with the civil law; which holds that the *pater familias*, in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi.*"

We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

2. LEGAL TRANSACTIONS

HOLLAND, JURISPRUDENCE, Chap. 8.

Acts are divided by Jurisprudence into those which are "lawful" and those which are "unlawful." The juristic result of the unlawful acts is never that aimed at by the doer. In the case of some lawful acts, their operation is independent of the intention of the doer; in the case of others, his intention is directed to the juristic result.

In the last mentioned case, the act is technically described as "*negotium civile*," "*actus legitimus*," "*Acte juridique*," "*Rechtsgeschaeft*;" the nearest English equivalent for which terms is probably "Juristic Act." A recent writer has used for this purpose the phrase "act in the law."

It has been defined, by a high authority, as "an act the intention of which is directed to the production of a legal result." But this definition, as it stands, is wider than the received use of the term would warrant. The judgment of a Court, or an order of the Queen in Council might fairly be so described. A better definition is "a manifestation of the will of a private individual directed to the origin, termination, or alteration of rights." A "Juristic Act" has also been well described as "the form in which the Subjective Will develops its activity in creating rights, within the limits assigned to it by the law." The same writer continues: "only in so far as it keeps within these limits does it really operate; beyond them its act is either barren of result, is an empty nullity, or its operation is turned negatively against the will, as an obligation to undo what has been done, by suffering punishment or making reparation."

Juristic Acts (*Rechtsgeschaefte*) must, of course, exhibit, in common with all Acts (*Handlungen*), an exertion of will, accompanied by consciousness, and expressed; and any circumstances which prevent the free and intelligent exertion of the will may either prevent the occurrence of the Juristic Act, or may modify the consequences which result from it. What might appear to be a Juristic Act, is thus "null," or "void," *i.e.* has, as such, no existence, if due to such actual violence as excludes an exertion of will, or if accompanied by states of consciousness, such as lunacy, drunkenness, and certain kinds of mistake, which are incompatible with an intelligent exertion of will. So also a Juristic Act, which does come into existence, is "voidable," *i.e.* is liable to be attacked, and prevented from producing its ordinary results, if attended at its inception by duress *per minas* (*metus*), by fraud (*dolus*), and, in some exceptional cases, by mistaken motives.

(a) *Form*

AN ACT FOR THE PREVENTION OF FRAUDS AND PERJURIES, 29 Car. II, c. 3, (1676.)

For prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that from and after the four and twentieth day of June, which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount unto two third parts at the least of the full improved value of the thing demised.

III. And moreover, That no leases, estates or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

IV. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person;

(3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

V. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June all devises and bequests of any lands or tenements, devisable either by force of the statute of wills, or by this statute, or by force of the custom of *Kent*, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

VI. And moreover, no devise in writing of land, tenements or hereditaments, nor any clause thereof, shall at any time after the said four and twentieth day of June be revocable, otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn or obliterated by the testator, or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding.

VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall

or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything herein before contained to the contrary notwithstanding.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect.

AMES, LAW AND MORALS, 22 Harvard Law Rev. 97, 100.

We have seen how in the law of crimes and torts the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor. The history of the law of contracts exhibits a similar transformation in the legal significance of the written or spoken word. By the early law, in the absence of the formal word, there was no liability, however repugnant to justice the result might be. On the other hand, if the formal word was given, then the giver was bound, however unrighteous, by reason of the circumstances under which he gave it, it might be to hold him to his promise. The persistence of this unmoral doctrine in the English law is most surprising. As late as 1606 the plaintiff brought an action alleging that the defendant, a goldsmith, sold him a stone, affirming it to be a bezoar stone, whereas it was not such a stone. The court gave judgment against the plaintiff on the ground "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action." The buyer reasonably supposed that he was getting a valuable jewel for his hundred pounds, but he must pocket his loss, since the goldsmith did not use the magic words "I warrant" or "I undertake." Today, of course, the sale of a chattel as being of a particular description implies a warranty or undertaking to that effect. But the notion of implying a promise from the conduct of the party was altogether foreign to the mental operations of the medieval lawyer. For this reason, the buyer took the risk of the seller's not being the owner of the property sold unless the seller expressly warranted the title. In the case of goods the mere selling as owner is today a warranty of title, but the rules of real property not being readily changed, the archaic law still survives in the case of conveyances of land, the grantee being without

remedy if there is no covenant of title in the deed. The inability to imply a promise from the conduct of the parties explains this remark of Chief Justice Brian: "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me." Similarly, in the reign of Elizabeth a gentleman of quality put up at an inn with his servants and horses. But no price was agreed upon for his accommodations. The gentleman declining to pay, the inn-keeper could obtain no relief at law. Neither the customer nor the guest had made an express promise to pay. The law could not continue in this state. It was shocking to the moral sense of the community that a man should not pay for what was given him upon the mutual understanding that it should be paid for. Accordingly the judges at length realized and declared that the act of employing a workman, ordering goods, or putting up at an inn meant, without more, an undertaking to make reasonable compensation.

There is a certain analogy between the ethical development of the law and that of the individual. As early law is formal and unmoral, so the child or youth is wont to be technical at the expense of fairness.

WHEELER v. KLAHOLT, SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1901 (178 Mass. 141).

Holmes, C. J.: This is an action for the price of one hundred and seventy-four pairs of shoes, and the question raised by the defendants' exceptions is whether there was any evidence, at the trial, of a purchase by the defendants. . . .

The evidence of the sale was this. The shoes had been sent to the defendants on the understanding that a bargain had been made. It turned out that the parties disagreed, and if any contract had been made it was repudiated by them both. Then, on September 11, 1899, the plaintiffs wrote to the defendants that they had written to their agent, Young, to inform the defendants that the latter might keep the goods "at the price you offer if you send us net spot cash at once. If you cannot send us cash draft by return mail, please return the goods to us immediately via Wabash & Fitchburg Railroad, otherwise they will go through New York City and it would take three or four weeks to get them." On September 15, the defendants enclosed a draft for the price less four per cent, which they said was the proposition made by Young.

On September 18 the plaintiffs replied, returning the draft, saying that there was no deduction of four per cent, and adding, "if not satisfactory please return the goods at once by freight via Wabash & Fitchburg Railroad." This letter was received by the defendants on or before September 20, but the plaintiffs heard nothing more until October 25, when they were notified by the railroad company that the goods were in Boston.

It should be added that when the goods were sent to the defendants they were in good condition, new, fresh and well packed, and that when the plaintiffs opened the returned cases their contents were more or less defaced and some pairs of shoes were gone. It fairly might be inferred that the cases had been opened and the contents tumbled about by the defendants, although whether before or after the plaintiffs' final offer perhaps would be little more than a guess.

Both parties invoke *Hobbs* v. *Massasoit Whip Co.*, 158 Mass. 194, the defendants for the suggestion on p. 197 that a stranger by sending goods to another cannot impose a duty of notification upon him at the risk of finding himself a purchaser against his own will. We are of the opinion that this proposition gives the defendants no help. The parties were not strangers to each other. The goods had not been foisted upon the defendants, but were in their custody presumably by their previous assent, at all events by their assent implied by their later conduct. The relations between the parties were so far similar to those in the case cited, that if the plaintiffs' offer had been simply to let the defendants have the shoes at the price named, with an alternative request to send them back at once, as in their letters, the decision would have applied, and a silent retention of the shoes for an unreasonable time would have been an acceptance of the plaintiffs' terms, or, at least would have warranted a finding that it was. . . .

The defendants seek to escape the effect of the foregoing principle, if held applicable, on the ground of the terms offered by the plaintiffs. They say that those terms made it impossible to accept the plaintiffs' offer, or to give the plaintiffs any reasonable ground for understanding that their offer was accepted, otherwise than by promptly forwarding the cash. They say that whatever other liabilities they may have incurred they could not have purported to accept an offer to sell for cash on the spot by simply keeping the goods. But this argument appears to us to take one half of the plaintiffs' proposition with excessive nicety, and to ignore the alternative.

Probably the offer could have been accepted and the bargain have been made complete before sending on the cash. At all events, we must not forget the alternative, which was the immediate return of the goods.

The evidence warranted a finding that the defendants did not return the goods immediately or within a reasonable time, although subject to a duty in regard to them. The case does not stand as a simple offer to sell for cash received in silence, but as an alternative offer and demand to and upon one who was subject to a duty to return the goods, allowing him either to buy for cash or to return the shoes at once, followed by a failure on his part to do anything. Under such circumstances, a jury would be warranted in finding that a neglect of the duty to return imported an acceptance of the alternative offer to sell, although coupled with a failure to show that promptness on which the plaintiffs had a right to insist if they saw fit, but which they also were at liberty to waive.

(b) *Grounds of Avoidance*

(i) *Duress and Undue Influence.*

BRITTON, Chap. XII, § 8 (Nichols' translation).

And we will, that whatever contracts shall be made in prison by prisoners not taken or detained for felony shall be held valid, unless made under such distress as includes fear of death or torture of body; and in such case they shall reclaim their deed, as soon as they are at liberty, and signify the fear they were under to the nearest neighbours and to the coroner; and if they do not reclaim such deeds by plaint within the year and day, the deeds shall be valid.

SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES, 10 (1590).

Where it is said in the definition *of our will*, the interpreters doe gather by this woorde *our*, that the testator ought to enjoy all liberty, and freedome in the making of his will; that is to say full power and habilitie, to withstande all contradiction and countermaund. And therefore if the testator be compelled by violence, or urged by threatnings, to make his testament: the testament being made by iust feare, is uneffectuall. Likewise if hee bee circumuented by fraud, the testament loseth his force: for albeit honest and modest intercession, or request, is not prohibited; yet these

fraudulent and malicious meanes, whereby many are secretly induced to make their testamentes, are no lesse detestable then open force.

BLACKSTONE, COMMENTARIES, I, 130-131.

For whatever is done by a man to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the fourth book. The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of which there are two sorts: duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas*, where the hardship is only threatened and impending, which is that we are now discoursing of. Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; "*non*," as Bracton expresses it, "*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitae periculum, aut corporis cruciatum.*" A fear of battery or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed, because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages: but no suitable atonement can be made for the loss of life or limb. And the indulgence shown to a man under this, the principal sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law; *ignoscitur ei qui sanguinem suum qualiter redemptum voluit.*

AMES, SPECIALTY CONTRACTS AND EQUITABLE DEFENSES, 9 Harvard Law Rev. 49, 57.

The general rule, that the misconduct of the obligee in procuring or enforcing a specialty obligation was no bar at common law to an action upon the instrument, was subject to one exception. As far

back as Bracton's time, at least, one who had duly signed and sealed an obligation, and who could not therefore plead *non est factum*, might still defeat an action by pleading affirmatively that he was induced to execute the specialty by duress practised upon him by the plaintiff. The Roman law was more consistent than the English law in this respect. For, by the *jus civile*, duress, like fraud, was no answer to a claim upon a formal contract. All defenses based upon the conduct of the obligee were later innovations of the praetor, and were known as *exceptiones praetoriae*, or as we should say, equitable defenses.

It is quite possible that the anomalous allowance of the defense of duress at common law may be due to some forgotten statute. But whatever its origin, the defense of duress does not differ in its nature from the defense of fraud. As Mr. Justice Holmes well says: "The ground upon which a contract is voidable for duress is the same as in the case for fraud; and is that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action." Duress was, therefore, never regarded as negativing the legal execution of the obligation. "The deed took effect, and the duty accrued to the party, although it were by duress and afterwards voidable by plea." The defense is strictly personal, and not real; that is, it is effective, like all equitable defenses, only against the wrong-doer, or one in privity with him. Duress by a stranger cannot, therefore, be successfully pleaded in bar of an action by an innocent obligee; and duress by the payee upon the maker of a negotiable note will not affect the rights of a subsequent *bona fide* holder for value.

STORY, EQUITY JURISPRUDENCE, I, §§ 238, 239.

238. The doctrine therefore may be laid down as generally true, that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in Courts of Equity if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, or artifice, or undue influence. The rule of the common law seems to have gone further in cases of wills (for it is said that perhaps it can hardly be extended to deeds without circumstances of fraud or imposition), since the common law requires that a person, to dispose of his property by will, should be of sound and disposing memory, which imports that the testator should have

understanding to dispose of his estate with judgment and discretion; and this is to be collected from his words, actions, and behavior at the time, and not merely from his being able to gave a plain answer to a common question. . . .

239. Cases of an analogous nature may easily be put where the party is subjected to undue influence, although in other respects of competent understanding. As where he does an act or makes a contract when he is under duress or the influence of extreme terror or of threats, or of apprehensions short of duress. For in cases of this sort he has no free will, but stands *in vinculis.* And the constant rule in equity is, that where a party is not a free agent and is not equal to protecting himself, the court will protect him. The maxim of the common law is "*Quod alias bonum et justum est, si per vim vel fraudem petatur, malum et injustum efficitur.*" On this account Courts of Equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition, in such cases they will set the contracts aside. Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, may in like manner so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some oppression or fraudulent advantage or imposition attendant upon it.

PEOPLE v. SPEIR, COURT OF APPEALS OF NEW YORK, 1879 (77 N. Y. 144, 150).

Danforth, J.: There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the *law* implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all.

(ii) *Fraud.*

AMES, SPECIALTY CONTRACTS AND EQUITABLE DEFENSES, 9 Harvard Law Rev. 49, 51.

Startling as the proposition may appear, it is nevertheless true that fraud was no defense to an action at law upon a sealed contract. In 1835, in *Mason* v. *Ditchbourne*, the defendant urged as a defense to an action upon a bond, that it had been obtained from him by fraudulent representations as to the nature of certain property; but the defense was not allowed. Lord Abinger said: "The old books tell us that the plea of fraud and covin is a kind of special *non est factum*, and it ends 'and so the defendant says it is not his deed.' Such a plea would, I admit, let in evidence of any fraud in the execution of the instrument declared upon: as if its contents were misread, or a different deed were substituted for that which the party intended to execute. You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defense is unavailing, when once it is shown that the party knew perfectly well the nature of the deed which he was executing." This case was followed in 1861 in *Wright* v. *Campb ll*, Byles, J., remarking: "Surely, though you shewed the transaction out of which it arose to have been fraudulent, yet in an action at *law*, on the *deed*, that would not be available as a *legal* defense."

HAYNES, OUTLINES OF EQUITY, Lect. 5.

Now, going back to the earliest discussions respecting the interposition of equity, we find it repeatedly stated, that "covin, accident, and breach of confidence" are the proper subjects of equity jurisdiction. There was a doggerel rhyme in vogue expressing the legal views on the subject:—

> "Three things are judged in court of conscience:
> Covin, accident, and breach of confidence."

The last of these three, breach of confidence, we have already, as you know, considered under the head of "trusts." The modern equivalent for the word "*covin*" is "*fraud.*" And *fraud* we now proceed to consider, together with *accident* (also referred to by Lord Coke) and *mistake*, which, to the best of my belief, is not mentioned as a head of equity, either by him or by any other text-writer of ancient date.

Taking, then, *fraud, accident,* and *mistake* in the order mentioned, it is first to be observed that, when discussing "*fraud*" under the

head of *concurrent* equity jurisdiction, we have, in strictness, no concern with those cases of constructive fraud, which rest upon doctrines forming part of almost every system of civilized jurisprudence, but yet ignored by the common law of England: I mean the doctrines, according to which a special disability is imposed, in reference to the dealings, whether in the nature of contract or of gift, of persons standing towards one another in certain confidential relations; such as *solicitor* and *client*, *guardian* and *ward*, *trustee* and *cestui que trust*.

Thus, by the Roman law, the tutor (or guardian) was prohibited from purchasing the property of his pupil (or ward), and a similar rule was applied to those standing in a similar fiduciary position.

So by the Code Napoleon the tutor (or guardian) is prohibited from either buying or taking a lease of his ward's property, without special authorization given by what is called the "*conseil de famille*," the family council, composed of the near relatives of the ward.

Our own equitable rule on the subject, in reference to gifts, was, in a case frequently quoted, thus referred to by Lord Eldon: "This case proves the wisdom of the court, in saying that it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestui que trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty."

Laying out of account, then, these cases of "constructive fraud," or "fraud in equity," we proceed to consider the equity jurisdiction in cases of fraud, in its popular or ordinary sense of imposition or circumvention; cases, in fact, falling within the old legal term "covin," and which, in the modern text-books, such as Story's Equity Jurisprudence, you will find ranged under the head of "*actual fraud*."

Now, in these cases of actual fraud, the jurisdiction of equity was, in the main, strictly *concurrent*. The court of law took cognizance of the fraud, both as ground for a right of action and as a ground of defense. Thus, where money had been obtained through fraud, an action on the case lay for its recovery back; and to any action brought upon an instrument obtained by fraud, a plea of fraud in obtaining it was a good defense.

The equity jurisdiction, however, possessed many advantages over the legal. Thus, in most instances of actual fraud, equity possessed the means of compelling the defendant to answer, upon oath, detailed interrogatories respecting all the alleged facts and circum-

stances of the fraud, many of which facts and circumstances might be known only to the plaintiff and defendant; and this advantage alone would almost seem sufficient to have attracted into equity almost the entire jurisdiction in reference to fraud, when it is considered that, until within the last few years, neither could the plaintiff be heard as a witness to prove his own case, nor could he compel the defendant to attend and give evidence.

Again, where the fraud had resulted in a deed actually executed, conferring some estate or right which might be asserted *in futuro*, what was really wanted was a judgment, directing the deed to be given up to the person defrauded, or ordering it to be cancelled; and this was a species of remedy which the law courts never took upon themselves to administer. You may recollect, perhaps, my pointing out in my first lecture, that the maxim that equity acts "*in personam*" forms one of the distinguishing features of the equitable jurisdiction. As an off-shoot of this maxim, we find the equity courts, in the early times of Henry VI. and Edward IV. compelling the actor in the fraud to restore the fruits of his fraudulent conduct.

If anything further were needed to establish the superior appropriateness of the equitable jurisdiction over the legal, it would be found in the circumstance, that the Equity Court is able, in conformity with its habitual mode of action, while setting aside and undoing the fraudulent transaction, to qualify the annulling operation of its own decree in such a manner as may seem just. Thus, in the case of a bill to set aside a conveyance of real estate, as having been obtained by fraudulent representations at a grossly inadequate value — if the court set aside the deed, it will do so only on the terms of repayment of the purchase money and interest.

When we consider then the advantages of the Equity Court, in respect — first, of compelling discovery; secondly, of interfering actively to annul instruments fraudulently obtained; and thirdly, of properly modifying its decrees and adjusting them to the rights of all parties; it can hardly be wondered at that its jurisdiction, though technically *concurrent*, should have become almost *exclusive* in practice.

(iii) *Mistake.*

HAYNES, OUTLINES OF EQUITY, Lect. 5.

Mistake may be said to exist in the legal sense, where a person acting upon some erroneous conviction, either of law or of fact,

executes some instrument or does some act which, but for that erroneous conviction, he would not have executed or done.

Now, in reference to "*mistake*," there is one point upon which the doctrines of the common law and of equity will be found agreeing in the main both with each other and with the Roman law. It is this — that while mistake as to law affords no ground for relief, mistake as to fact does. Thus in the Digest, under the title "*De juris et facti ignorantia*," we find the law thus laid down: "*Regula est, juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.*" And the first illustration, given at the commencement of the title, of the distinction between ignorance of law and ignorance of fact may be freely rendered thus: — "If a man be ignorant of the death of a kinsman whose property is about to be dealt with, time shall not run against him: otherwise, if he be aware of the death and of his own relationship, but ignorant of his consequent rights."

Of the existence of the rule, as part of our common law jurisprudence, the case of *Bilbie* v. *Lumley* affords an apt instance. There, an underwriter, with knowledge of a fact which would have entitled him to dispute his liability under a policy of marine insurance which he had underwritten, but in ignorance of the legal rights resulting from that fact, paid the amount which he had assured; and subsequently brought an action to recover the money back. The Court of King's Bench held the action would not lie. Lord Ellenborough asked plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily, and with full knowledge of all the *facts* of the case, he could recover it back again on account of his ignorance of the *law*. No answer was given; and his lordship subsequently said, "Every man must be taken to be cognizant of the law; otherwise, there is no saying to what extent the ignorance might not be carried. It would be urged in almost every case."

This short observation contains, I conceive, the true ground for the distinction between mistake of law and mistake of fact. Probably, in a very large number of transactions there is at best but an imperfect knowledge of the real state of the law; and even where the knowledge really exists, few things could be easier to allege or harder to disprove than legal ignorance. Indeed, if mistake or misapprehension as to matter of law were admitted as a ground for reopening engagements solemnly entered into, it is difficult to see how any engagement could be relied on.

It must, however, be confessed that when we proceed to the consideration of the cases in equity respecting "*mistake*," we find occasionally the line of demarcation between mistake of law and mistake of fact less distinctly drawn in equity than either by the Roman or by the common law. This has occurred more particularly in those cases where, under special circumstances, combined with legal ignorance of a very glaring kind, the court has been induced to grant relief, and has apparently rested its judgment more or less on the mistake or ignorance of law. The oft-mentioned case of *Lansdowne* v. *Lansdowne* is, perhaps, the fittest representative of this class of cases. There, the plaintiff, who was son of the eldest brother of a deceased intestate, had a dispute with his uncle, a younger brother, respecting the right to inherit the real estate of the deceased. It was agreed to consult a schoolmaster, named Hughes, who, in his turn, resorted for counsel to a book called the "Clerk's Remembrancer," and finding the law as laid down in the book to be, "that land could not ascend, but always descended," he put the best exposition he could on these somewhat ambiguous words, and decided that the younger brother was entitled. Therefore, it was agreed that the son of the elder brother and the younger brother, his uncle, should share the lands, and a bond and conveyances were executed for the purpose of carrying out the agreement. The nephew subsequently filed his bill to be relieved; and Lord King, Chancellor, decreed that the bond and conveyances had been obtained by mistake and *misrepresentation of the law*, and ordered them to be given up to be cancelled. Lord King is reported to have said, in delivering judgment, that "That maxim of law, *Ignorantia juris non excusat*, was in regard to the Public, that Ignorance cannot be pleaded in Excuse of Crimes, but did not hold in Civil Cases." This, however, is clearly not law at the present day.[1]

The form of the decree in *Lansdowne* v. *Lansdowne*, viz., that the deeds should be delivered up, leads me naturally to the consideration of the superior efficacy of the equity jurisdiction in cases of "mistake." Here, as in cases of "fraud," we find the power of ordering the delivering up of the impeached instrument, imparting to the equitable jurisdiction a completeness vainly sought for at law. As respects the other ingredients of superiority which the

[1] But see Keener, Quasi Contracts, 85 ff; Woodward, Recovery of Money Paid under Mistake of Law, 5 Columbia Law Rev. 366; Stadden, Error of Law, 8 Columbia Law Rev. 476.

equitable jurisdiction has been mentioned as possessing in cases of "fraud" over that at law, both of which exist also in cases of "mistake," we may observe, that while on the one hand, the discovery obtainable through the medium of the equity courts only was, perhaps, of somewhat less importance in cases of "mistake"; so, on the other hand, the power to qualify, mould, and alter, instead of simply annulling and undoing, was, in cases of "mistake," of even greater importance. Take, as a specimen of mistake, the case of instructions given to prepare a settlement of the lands of a lady on the occasion of her marriage. Assume that under special circumstances, it had been arranged that, after limitations to the lady and her husband for their lives, the property should go to such uses in favor of the children as the wife alone should, by deed or will, appoint; and that, inadvertently, the power of appointment was given to the husband and wife and the survivor, in the usual form. Now, what is wanted is not to *undo* the settlement, but merely to alter it and make it what the parties intended it should be. The deed requires to be "reformed," as the technical phrase is; and of the entire equity jurisdiction, derivable from the three heads of *fraud*, *accident* and *mistake*, it would be difficult to name any portion which is more beneficial, or more judiciously exercised, than that of reforming deeds in cases of *mistake*.

(c) *Qualifications*

(i) *Conditions.*

BLACKSTONE, COMMENTARIES, II, 154–157.

An estate on condition expressed in the grant itself is where an estate is granted, either in *fee-simple, or otherwise* with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition. These conditions are therefore either *precedent*, or *subsequent*. Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or non-performance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee-simple passeth not till the hundred

marks be paid. But if a man grants an estate in fee-simple, reserving to himself and his heirs a certain rent; and that if such rent be not paid at the time limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. . . . And, on the breach of any of these subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determinable and void.

A distinction is, however, made between a *condition in deed* and a *limitation*, which Littleton denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation:* as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500 *l.*, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500 *l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40 *l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a condition: because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B determines,

and that of D commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir himself could have entered for a breach of condition.

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These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As if a feoffment be made to a man in fee-simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S, by such a day, (within which time the woman dies, or the feoffor marries her himself;) or unless he kills another; or in case he alienes in fee; that then and in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed.

LANGDELL, SUMMARY OF CONTRACTS, §§ 26-31.

26. A covenant or promise is conditional when its performance depends upon a future and uncertain event. The futurity and uncertainty of the event have reference to the time when the covenant or promise is made. If the event has then ceased to be future and uncertain, though not to the knowledge of the covenantor or promisor, it will not constitute a condition. Nor is it sufficient that the event be future, unless it be also uncertain; and the uncertainty must not be merely as to the time when the event will happen, but as to whether it will ever happen. It is sufficient, however, that the event is uncertain, for then it must necessarily

be future also. It may be an event over which neither of the parties has any control, or it may be one within the control of the covenantee or promisee, *e.g.*, where it consists in his doing or not doing a certain act. It may also consist of an act to be done or not to be done by the covenantor or promisor, *e.g.*, where one covenants or promises to do a specific thing, and in the event of his not doing it to pay $1,000; but it cannot depend upon the mere will and pleasure of the covenantor or promisor, for such an event would destroy the covenant or promise instead of making it conditional. Thus, if A promise B to buy the latter's horse at such a price if he likes him after a week's trial, the promise will be void unless it can be interpreted as a promise, for example, to buy the horse unless a week's trial shall bring to light some fault in him of which the buyer was ignorant when he made the promise.

27. A covenant or promise cannot be conditional unless it first exist; it is only the performance of it that the condition renders uncertain. An event, therefore, which must happen before a covenant or promise is made, does not make the covenant or promise conditional. If the event happens, the covenant or promise is absolute; if it does not happen, no covenant or promise is made. In such cases the condition is made when the offer is made, and the condition is annexed to the offer, and becomes a part of it; but before the covenant or promise is made, the event has ceased to be uncertain, and hence the condition has ceased to exist. In short, it is the offer, and not the covenant or promise, that is conditional, The consideration of every unilateral promise is necessarily a condition of this nature until it is given or performed, while the consideration of a unilateral covenant may be a condition of the covenant or of the offer, according to the intention of the covenantor.

28. When the making of a covenant or promise depends upon whether a certain event has already happened, there is no condition of any kind. If the event has happened, the covenant or promise is absolute from the beginning; if the event has not happened, there is no covenant or promise at all. Thus, in *Ollive* v. *Booker*, the court having decided that the defendant's promise to take the vessel depended upon her "having sailed three weeks ago," and that event not having happened, it necessarily followed that the defendant had made no promise. So in *Behn* v. *Burness*, the statement that the vessel was "now in the port of Amsterdam" being untrue, it followed from the decision of the court that the defendant had made no promise. . . . .

29. As the event which is to render a covenant or promise conditional must not happen before the covenant or promise is made, so it must not happen after it is performed; for the effect of the condition must be to render the performance uncertain, whereas an event happening after performance cannot affect the covenant or promise in any manner. Conditions cannot therefore be divided into classes with reference to their relation in point of time either to the making or to the performance of the covenant or promise; nor can they with reference to the nature of the event, for any uncertain event which is to happen, if at all, between the making of the covenant or promise and its performance (or concurrently with the latter at latest) may constitute a condition of any kind. In truth, the division of conditions into conditions precedent, concurrent conditions, and conditions subsequent, is designed to mark the relation in point of time between the event which constitutes the condition and the obligation of the covenant or promise. What that relation is in any given case depends upon when the obligation of the covenant or promise is to arise, and that depends upon the intention of the covenantor or promisor. Thus, if the covenant or promise is not designed to impose any obligation or confer any right until the event happens, the condition is said to be precedent, *i.e.*, it precedes the obligation in time. So, if the covenant or promise is designed to impose an obligation and confer a right from the moment when it is made, and so before the event happens, the condition is said to be subsequent, *i.e.*, subsequent in time to the obligation. Finally, if the covenant or promise is designed to impose an obligation and confer a right at the moment when the event happens, the condition is said to be concurrent, *i.e.*, concurrent in time with the obligation. In this last case the event which constitutes the condition always consists of some act to be done by the covenantee or promisee, and the object of having the obligation arise at the very moment when the event happens (rather than afterwards) is to enable the covenantee or promisee to insist upon performance of the covenant or promise at the same moment that he performs the condition; and it is this right of the covenantee or promisee that constitutes the chief difference between conditions precedent and concurrent conditions. Hence the idea has naturally arisen that the relation in time between the performance of the covenant or promise and the performance of the condition is the cause, instead of the consequence, of the condition's being concurrent.

30. Between conditions precedent and conditions subsequent the differences are important and radical. In case of a condition precedent, as the obligation to perform the covenant or promise does not arise until the event happens, of course until then there can be no breach of the obligation, and hence no action can be brought; and when an action is brought, it is a necessary part of the plaintiff's case to allege and prove that the event has happened. In the case of a condition subsequent, on the other hand, as the obligation to perform the covenant or promise arises the moment that the latter is made, a breach of the obligation has no connection with the happening of the event, and may take place either before or after the event happens. When an action is brought, therefore, the plaintiff can make out his case without any reference to the condition; and if in truth the event has happened, and the defendant is in consequence not bound to perform his covenant or promise, the burden lies upon him to allege and prove that fact. A condition subsequent, therefore, is always a defense, and an affirmative one. While the performance of the covenant or promise depends upon the happening of the event in both cases, it depends upon it in a different sense in the one case from what it does in the other: in case of a condition precedent, the covenant or promise is not to be performed *unless* the event happens; while, in the case of a condition subsequent, it is not to be performed *if* it happens. A condition precedent is an element in the creation of an obligation: a condition subsequent is one of the means by which an obligation is extinguished.

31. When it is said that, in the case of a condition subsequent, the obligation to perform arises immediately upon the making of the covenant or promise, it must not be inferred that performance is necessarily to take place immediately. An obligation may exist now to do a thing at a future time, and it may or may not be certain when that time will arrive, provided it be certain that it will arrive some time; and yet the performance of that obligation may be liable to be defeated by a condition subsequent. It is possible, therefore, for an obligation to be extinguished by a condition subsequent before the time for performing the obligation arrives, and hence before any right of action accrues. Yet if an action be brought after the time for performance arrives, the plaintiff will be able to state and prove facts which will entitle him to recover, unless the defendant sets up and proves his defense arising from the condition subsequent.

(ii) *Time.*

COMBE v. PITT, KING'S BENCH, 1763 (3 Burr. 1423, 1434).

Lord Mansfield: But though the law does not, *in general*, allow of the fraction of a day, yet it admits it in cases where it is *necessary to distinguish*. And I do not see why the very *hour* may not be so too, *where* it is *necessary* and *can* be done: for, it is *not* like a mathematical point, which *cannot* be divided.

LESTER v. GARLAND, IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R. 1808 (15 Ves. 248, 252).

The Master of the Rolls: The question in this cause is, whether Mrs. *Pointer* within six calendar months after the decease of her brother gave the security, required by his Will, as the condition, upon which her children should take the benefit of his residuary estate. He died upon the 12th of *January*, 1805, at a quarter before nine o'clock in the evening. The security required was executed upon the 12th of *July* following, about seven in the evening. Computing the time *de momento in momentum*, six calendar months had not elapsed: but it is admitted, that this is not the way in which the computation is legally to be made. The question is, whether the day of Sir *John Lester's* death is to be included in the six months, or to be excluded: if the day is included, she did not, if it is excluded, she did, give the required security before the end of the last day of the six months; and therefore did sufficiently comply with the condition.

It is said for the Plaintiffs, that upon this subject a general rule has been by decision established; that, where the time is to run from the doing of an act, (and for the purpose of this question it must extend to the happening of an event) the day is always to be included. Whatever *dicta* there may be to that effect, it is clear, the actual decisions cannot be brought under any such general rule. The presentment of a bill of exchange to the sight of the drawee is an act done; and yet it is now settled, that the day, upon which it is presented, is to be excluded. . . . The Annuity Act provides, that the twenty days shall run from the execution of the deed. The execution of the deed is undoubtedly an act done: yet according to the decisions the day upon which the deed was executed, is excluded. So, in a case in the House of Lords, in 1796, in which I was Counsel, *Mercer* v. *Oglivie*, where the question was, whether within the meaning of the Act of Parliament in *Scotland* "for regulating deeds done on death-bed" a man had lived sixty

days after *the making and granting of the deed,* it was held, that the day, on which the deed was *made and granted,* was to be excluded. . . .

It is not necessary to lay down any general rule upon this subject: but upon technical reasoning I rather think, it would be more easy to maintain, that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to any one, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed. This reasoning was adopted by Lord *Rosslyn* and Lord *Thurlow* in the case before mentioned of *Mercer* v. *Oglivie*. . . . In the present case the technical rule forbids us to consider the hour of the testator's death at the time of his death; for that would be making a fraction of a day. The day of the death must therefore be the time of the death; and that time must be past, before the six months can begin to run. The rule, contended for on behalf of the Plaintiffs, has the effect of throwing back the event into a day, upon which it did not happen; considering the testator as dead upon the 11th, instead of the 12th, of *January;* for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be no alternative but either to take the actual instant, or the entire day, as the time of his death; and not to begin the computation from the preceding day.

SMITH V. COUNTY COMMISSIONERS OF JEFFERSON COUNTY, SUPREME COURT OF COLORADO, 1887 (10 Col. 17, 22).

Beck, C. J.: In this connection counsel for the appellee asks for an opinion "as to what length of time will constitute a day's service for the superintendent." We answer, the law does not recognize fractions of days; and, when it provides a *per diem* compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necesssary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance.

3. TORTS[1]

HEARN, THEORY OF LEGAL DUTIES AND RIGHTS, 152–158.

Wrong is the contrary of right, and a wrong is the contrary of a right. The same ambiguity therefore which affects right exists in wrong. As the former term means conformity to a standard, so the latter term means nonconformity to a standard. Consequently, unless the standard be ascertained and recognized, all reasoning on the subject of right and wrong is mere waste of words. In the case of legal rights and legal wrongs, as a right means that a relative duty is obeyed or is likely to be obeyed, so a wrong means that a relative duty has actually been broken. A right exists before a breach of the duty; but a wrong does not arise until the breach has occurred. A wrong therefore, like a right, is simply a legal relation. But these relations are co-ordinate. They result from a common duty. A wrong is not the violation of a right, but the violation of a duty. It is true that the former expression is ordinarily used; but that expression is a mere abridgment, and, like other abridgments, becomes misleading. It is merely a metaphor to say that a right, which is only a relation, is broken. It is the duty cast upon the party to whom the command is given — the act that is to be done or the forbearance that is to be observed — that is disobeyed. So long as that duty is performed, all is well, and no difficulty arises. When that duty is not performed, the donee of the right is entitled to seek legal redress. Thus a right has no independent existence. It denotes merely a certain course of proceedings taken by its donee upon the breach of a certain species of duty. When, therefore, we speak of the violation of a right or of its infringement, we really mean the violation or the infringement of a duty in respect of which a right exists, so far as such violation or infringement affects the donee of the right. When such a duty has been so broken, a wrong has been done to the donee of the right, and for that wrong the law will find a remedy.

Even at the expense of some repetition, I may be permitted to bring together all the parts of a command of the State which involves rights and wrongs. The State commands its Subject to do or observe for the benefit of a Third Party some act or forbearance.

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[1] The student may be referred to Bigelow, Torts (8 ed.); Salmond, Torts (2 ed.); Wigmore, Summary of the Principles of Torts, Select Cases on the Law of Torts, vol. 2, appendix A.

Thereupon that Subject comes under a duty, and this duty the State will, if need be, enforce. In these circumstances the Third Party has a right; that is, he may enjoy the advantage resulting from the performance of the Subject's duty, and he may complain to the State if that performance be intermitted. So long as the Subject continues to perform his duty, all is well. The State is satisfied with his conduct. The Third Party enjoys his right. No unpleasantness arises. But if the Subject become disobedient, a new set of relations is introduced. The Subject incurs the displeasure of the State, and is liable to punishment or other painful consequence. The Third Party no longer enjoys a right, but sustains a wrong. For this wrong the Subject is liable to make some appropriate reparation. Liability means that, upon proper proceedings being taken and proper proof adduced, a court of competent jurisdiction may order the offender to suffer suitable punishment or to make suitable amends, or both to suffer punishment and to make amends, as the nature of the case requires. When the disobedience affects the donee of a right, it is usually called a wrong. The term offense appears to be a general name, and to include both crimes and wrongs. Thus every command produces or may produce two sets of relations. One of these is normal and the other is abnormal. If the command at once accomplish its object, there follow from it obedience, enjoyment of rights, freedom from legal molestation. If it do not directly accomplish its object, there follow from it disobedience, wrongs, legal proceedings and the painful consequences that such proceedings involve.

Every offense is a breach of duty. Every breach of duty either is punishable or is not punishable. Punishable offenses may be prosecuted either by indictment or other like proceedings which we need not now consider, or before justices of the peace in the exercise of their summary jurisdiction. Indictable offenses, as they may be called, are of two kinds. They are either crimes or misdemeanors. Misdemeanor is a general name for all indictable offenses other than crimes. Crimes are a species of indictable offenses. They have certain characteristic incidents that attach to them upon charge and upon conviction. Where a man is charged with any crime, he may be arrested without warrant, and he is bailable not as of right but only at the discretion of the court. In other cases, unless special statutory authority be given, a warrant is always required; and an accused person, upon the production of sufficient sureties to a reasonable amount, is bailable as of right.

Where a man is convicted of a crime, he incurs in addition to the punishment specified for the offense, certain disabilities. He cannot sit in Parliament or in any Municipal Council. He cannot exercise any Parliamentary or Municipal franchise. He cannot hold any office under the Crown or any public employment. He cannot serve on any jury. If he be an office-holder or a pensioner in any form, his office or his pension or other allowance is forfeited unless he be pardoned within two months from his conviction or before his office be filled. Further, his rights of maintaining action and of dealing with property and of making contracts are suspended during his term of punishment, and his property is placed in the hands of a curator. None of these consequences follow a conviction for a misdemeanor.

Whether any given offense is a crime or a misdeameanor is a question which depends upon the terms of the law by which that offense is created. I have already observed that no general rule on the subject is available, except the obvious one that those offenses are described as crimes which appear to the Legislature of the day to be the most dangerous in their character, and, consequently, the most in need of repression. Offenses over which justices have summary jurisdiction are, if we speak in the same rough way, those of a less grave character. Of these, too, it must be said that the jurisdiction of the justices, whatever may be the character of the offense, depends entirely upon express statutory grant. In some cases such jurisdiction is given in circumstances which otherwise would amount to a crime, and in all cases where their jurisdiction is not distinctly taken away, the superior courts exercise a concurrent authority. Where, in the opinion of the justices, any charge appears to be of a serious nature, they are bound to abstain from adjudication and to send the case for trial. But those minor varieties of serious offenses with which they usually deal are not regarded as crimes, and practically no superior court interferes with their proceedings in any smaller breach of the law. Thus the tendency to differentiation in criminal procedure is well marked. The minor offenses are heard and determined by justices. The graver offenses come before the superior courts. The differences of procedure in these courts according to the nature of the offense no longer exist. But a clear line is drawn between those ordinary aberrations to which all men are in a greater or less degree liable, and those darker offenses from which the moral sense of the community revolts.

We can now appreciate a distinction which has caused much trouble to jurists, that, namely, between crimes (in the wide sense) and torts. The distinction is less important than the discussion upon it might seem to indicate. In practice no person is either aided or embarrassed by it. In theory it is altogether useless as a basis for any classification of law. It presents, however, certain features which require explanation. It does not arise from any difference in the gravity of the offenses that these two words respectively imply. Such a difference does indeed generally exist, but it is not necessary. A slander, for example, is morally worse, and its pecuniary consequences may be more serious, than the neglect to register a young dog within the first half of January. Yet the former is only a tort, and the latter a punishable offense, although it is dealt with by an inferior court. Nor is the difference one of procedure alone. These differences, that of gravity and that of procedure, sufficiently distinguish indictable offenses and those less serious offenses in which justices of the peace have a summary jurisdiction. They mark sufficiently at least for practical purposes the subdivisions of one class of breaches of duty. But as between the classes of these breaches there is a further difference. They differ not only in degree and in procedure, but also in the character of the duties which are broken and in the sanctions for such breach.

The governing principle is, as we might expect, the nature of the duties. If the duty broken be absolute, the consequence is a punishable offense. If it be particular, the consequence is a breach of contract or other obligation. If it be general, the consequence is a tort or both a punishable offense and a tort. In all these cases the sanction is different, the person who sets in motion the law is different, and the procedure is different. The breach of an absolute duty is followed by punishment; the penalty is enforced by the Crown, and the complaint is determined by those tribunals and those modes of procedure which we call criminal. The breach of a particular duty is now followed by compensation or other appropriate remedy. The person who sets the law in motion is the donee of the right. The case is heard and determined in the manner and by the courts which, in contradistinction from those that are called criminal, are called civil. The breach of a general duty is pursued in both or either of the above methods. If it be pursued in the same manner in which it would be pursued if the duty broken were absolute, the case is regarded as a punishable offense. If it be

pursued in the same manner in which it would have been pursued if the duty broken were particular, the case is regarded as a tort. Whether it be pursued exclusively in the one way or in the other depends upon the terms of the law by which the duty is created. But, as general duties imply two parties interested in their performance, namely, the commander, that is the State, and the donee of the right, the breach of such a duty affects both of these parties; and thus the same offense may be treated both as a wrong to the State which deserves punishment and as a tort by which special damage is caused to a particular person. Thus, defrauding the public revenue is a punishable offense. In some of its forms it is punished by fine and forfeiture inflicted either by the Commissioner of Customs or before justices. In other cases it is an indictable offense, and is punishable on conviction before the Supreme Court by imprisonment for a long term with or without hard labor. Disorderly conduct in the streets is a punishable offense — not a very heinous one, it is true, but still such an offense. One man agrees to buy property from another man, and then refuses to perform his part of the agreement. That person has broken his contract, and is liable at the suit of the other party to damages or to a decree for specific performance, according to the circumstances of the case. Two men have a dispute as to the ownership of goods, and one of them takes or retains property which really belongs to the other. Such an act does not amount to a crime; but the person who has done so is guilty of a tort, and is liable to damages. A man fraudulently and without color of right takes property which he knows to belong to another. He is guilty of the crime of theft, and will be sent to prison probably with hard labor. But this offender has also by his wrongful act caused damage to the owner of the property; and for this tort he is, in addition to his punishment, liable to make to that owner compensation.

BLACKSTONE, COMMENTARIES, III, 119–128.

The rights of *persons*, we may remember, were distributed into *absolute* and *relative: absolute*, which were such as appertained and belonged to private men, considered merely as individuals, or single persons; and *relative*, which were incident to them as members of society and connected to each other by various ties and relations. And the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty, and the right of private property, so that the wrongs or injuries affecting them must consequently be of a corresponding nature.

I. As to injuries which affect the *personal security* of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.

1. With regard to the first subdivision, or injuries affecting the life of man, they do not fall under our present contemplation; being one of the most atrocious species of crimes, the subject of the next book of our commentaries.

2, 3. The two next species of injuries, affecting the limbs or bodies of individuals, I shall consider in one and the same view. And these may be committed, 1. By threats and menaces of bodily hurt, through fear of which a man's business is interrupted. A menace alone, without a consequent inconvenience, makes not the injury: but, to complete the wrong, there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by action of *trespass vi et armis;* this being an inchoate, though not an absolute, violence. 2. By *assault;* which is an attempt or offer to beat another, without touching him; as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him but misses him; this is an assault, *insultus*, which Finch describes to be "an unlawful setting upon one's person." This also is an inchoate violence, amounting considerably higher than bare threats; and therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis;* wherein he shall recover damages as a compensation for the injury. 3. By *battery;* which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. And therefore upon a similar principle the Cornelian law *de injuriis* prohibited *pulsation* as well as *verberation;* distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none. But battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent, or master, gives moderate correction to his child, his scholar, or his apprentice. So also on the principle of self-defense: for if one strikes me first, or even only assaults me, I may strike in my own defense; and, if sued for it, may plead *son assault demesne*, or that it was the plaintiff's own original assault that occasioned it. So likewise in defense of my goods or possession, if a man endeavors to deprive me of them I may justify laying hands

upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. Thus too in the exercise of an office, as that of church-warden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation. And if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is, as for assault, by action of *trespass vi et armis;* wherein the jury will give adequate damages. 4. By *wounding;* which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. By *mayhem*, which is an injury still more atrocious and consists in violently depriving another of the use of a member proper for his defense in fight. This is a battery attended with this aggravating circumstance that thereby the party injured is forever disabled from making so good a defense against future external injuries, as he otherwise might have done. Among these defensive members are reckoned not only arms and legs but a finger, an eye, and a foretooth, and also some others. But the loss of one of the jaw-teeth, the ear, or the nose is no mayhem at common law, as they can be of no use in fighting. The same remedial action of *trespass vi et armis* lies also to recover damages for this injury, an injury which (when wilful) no motive can justify but necessary self-preservation. . . . And here I must observe that for these four last injuries, assault, battery, wounding, and mayhem, an indictment may be brought as well as an action, and frequently both are accordingly prosecuted, the one at the suit of the crown for the crime against the public, the other at the suit of the party injured, to make him a reparation in damages.

4. Injuries affecting a man's *health* are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution. As by selling him bad provisions or wine; by the exercise of a noisome trade, which infects the air in his neighborhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. For it hath been solemnly resolved, that *mala praxis* is a great misdemeanor and offense at common law, whether it be for curiosity and experiment, or by neglect; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. Thus, also, in the civil law, neglect or want of skill in physicians or

surgeons, "*culpae adnumerantur, veluti si medicus curationem dereliquerit, male quempian secuerit, aut perperam ei medicamentum dederit.*" These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case.* This action of *trespass*, or transgression, *on the case*, is a universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. For though in general there are methods prescribed, and forms of actions previously settled, for redressing those wrongs, which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2, c. 24, to bring a special action on his own case, by a writ formed according to the peculiar circumstances of his own particular grievance. For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued. And it is a settled distinction, that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis;* but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by *consequence* and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case for the damages consequent on such omission or act.

5. Lastly; injuries affecting a man's *reputation* or good name are, first, by malicious, scandalous, and slanderous words, tending to his damage and derogation. As if a man maliciously and falsely utter any slander or false tale of another; which may either endanger him in law, by impeaching him of some heinous crime, as to say that a man hath poisoned another, or is perjured; or which may exclude him from society, as to charge him with having an infectious disease, or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. Words spoken in derogation of a peer, a judge, or other great officer of the realm, which are called *scandalum magnatum*, are held to be still more heinous: and though they be such

as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury: which is redressed by an action on the case founded on many ancient statutes, as well on behalf of the crown, to inflict the punishment of imprisonment on the slanderer, as on behalf of the party, to recover damages for the injury sustained. Words also tending to scandalize a magistrate, or person in a public trust, are reputed more highly injurious than when spoken of a private man. It is said, that formerly no actions were brought for words, unless the slander was such as (if true) would endanger the life of the object of it. But, too great encouragenent being given by this lenity to false and malicious slanderers, it is now held that for scandalous words of the several species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen. But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened; which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring any action against me, unless he can show some special loss by it; in which case he may bring his action against me for saying he was a bastard, *per quod* he lost the presentation to such a living. In like manner, to *slander another man's title*, by spreading such injurious reports as, if true, would deprive him of his estate, (as to call the issue in tail, or one who hath land by descent, a bastard) is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land. But mere scurrility, or opprobrious words, which neither in themselves import, nor are in fact attended with, any injurious effects will not support an action. So scandals, which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the ecclesiastical court; unless any temporal damage ensues, which may be a foundation for a *per quod*. Words of heat and passion, as to call a man a rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not actionable; neither are words spoken in a friendly manner, as by way of advice, admonition,

or concern, without any tincture or circumstance of ill will: for, in both these cases, they are not *maliciously* spoken, which is part of the definition of slander. Neither (as was formerly hinted) are any reflecting words made use of in legal proceedings, and pertinent to the cause in hand, a sufficient cause of action for slander. Also, if the defendant be able to justify, and prove the words to be true, no action will lie, even though special damage hath ensued: for then it is no slander or false tale. As if I can prove the tradesman a bankrupt, the physician a quack, the lawyer a knave, and the divine a heretic, this will destroy their respective actions; for though there may be damage sufficient accruing from it, yet, if the fact be true, it is *damnum absque injuria;* and where there is no injury the law gives no remedy. And this is agreeable to the reasoning of the civil law: "*eum qui nocentem infamat, non est aequum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*"

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like; which set him in an odious or ridiculous light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other cases, two remedies; one by indictment, and the other by action. The former for the *public* offense; for every libel has a tendency to the breach of the peace, by provoking the person libelled to break it; which offense is the same (in point of law) whether the matter contained be true or false; and therefore the defendant on an indictment for publishing a libel, is not allowed to allege the truth of it by way of justification. But in the remedy by action on the case, which is to repair the *party* in damages for the injury done him, the defendant may, as for words *spoken*, justify the truth of the facts, and show that the plaintiff has received no injury at all. What was said with regard to words spoken will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon; but as to signs or pictures, it seems necessary always to show, by proper *innuendoes* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed; otherwise it cannot appear that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences.

A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him; which, under the mask of justice and public spirit, are sometimes

made the engines of private spite and enmity. For this, however, the law has given a very adequate remedy in damages, either by an action of *conspiracy*, which cannot be brought but against two at the least; or, which is the more usual way, by a special action on the case for a false and malicious prosecution. In order to carry on the former, (which gives a recompense for the danger to which the party has been exposed,) it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is any the least probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom, if prosecutors, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried. But an action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had; as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. For it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded. However, any probable cause for preferring it is sufficient to justify the defendant.

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment, for which the law has not only decreed a punishment, as a heinous public crime, but has also given a private reparation to the party; as well by removing the actual confinement for the present, as, after it is over, by subjecting the wrong-doer to a civil action, on account of the damage sustained by the loss of time and liberty.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted, for the necessity of the thing, either by common law, or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending

of wagoners for misbehavior in the public highways. False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute hath declared that such service or process shall be void.

BLACKSTONE, COMMENTARIES, III, 165.

Besides the special action on the case, there is also a peculiar remedy, entitled an action of *deceit;* to give damages in some particular cases of fraud; and principally where one man does anything in the name of another, by which he is deceived or injured; as if one brings an action in another's costs; or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. As when, by collusion, the attorney of the tenant makes default in a real action, or where the sheriff returns that the tenant was summoned when he was not so, and in either case he loses the land, the writ of *deceit* lies against the demandant, and also the attorney or the sheriff and his officers; to annul the former proceedings, and recover back the land. It also lies in the cases of warranty before mentioned, and other personal injuries committed contrary to good faith and honesty. But an action *on the case*, for damages, in nature of a writ of *deceit*, is more usually brought upon these occasions.

BLACKSTONE, COMMENTARIES, III, 139-143.

We are next to contemplate those which affect their *relative* rights; or such as are incident to persons considered as members of society, and connected to each other by various ties and relations; and, in particular, such injuries as may be done to persons under the four following relations: husband and wife, parent and child, guardian and ward, master and servant.

I. Injuries that may be offered to a person, considered as a *husband*, are principally three: *abduction*, or taking away a man's wife; *adultery*, or criminal conversation with her; and *beating* or otherwise abusing her. 1. As to the first sort, *abduction*, or taking her away, this may either be by fraud and persuasion, or open violence: though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta.* This action lay at the common law; and thereby the husband shall recover, not the possession of his wife, but damages for taking her away. . . . And the husband is

also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause. The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned; but a stranger might carry her behind him on horseback to market, to a justice of the peace, for a warrant against her husband, or to the spiritual court to sue for a divorce. 2. *Adultery*, or criminal conversation with a man's wife, though it is, as a public crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater) the law gives a satisfaction to the husband for it by action of *trespass vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary. But these are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation, by settlement or otherwise, to provide for those children, which he cannot but suspect to be spurious. . . . The third injury is that of *beating* a man's wife, or otherwise ill using her; for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages, by action of *trespass vi et armis*, which must be brought in the names of the husband and wife *jointly;* but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass, in nature of an action upon the case, for this ill usage, *per quod consortium amisit;* in which he shall recover a satisfaction in damages.

II. Injuries that may be offered to a person considered in the relation of a *parent* were likewise of two kinds: 1. *Abduction*, or taking his children away; and, 2. *Marrying* his son and heir without the father's consent, whereby during the continuance of the military tenures he lost the value of his marriage. But this last injury is now ceased, together with the right upon which it is grounded; for, the father being no longer entitled to the value of the marriage, the marrying his heir does him no sort of injury for which a civil action will lie. As to the other, of abduction, or taking away the children from the father, that is also a matter of

doubt whether it be a civil injury or no; for, before the abolition of the tenure in chivalry, it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir; some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage; and others holding that an action would lie for taking away *any* of the children, for that the parent hath an interest in them all, to provide for their education. If, therefore, before the abolition of these tenures, it was an injury to the father to take away the rest of his children, as well as his heir, (as I am inclined to think it was), it still remains an injury, and is remediable by writ of *ravishment* or action of *trespass vi et armis*, *de filio*, *vel filia*, *rapto vel abducto;* in the same manner as the husband may have it on account of the abduction of his wife.

III. Of a similar nature to the last is the relation of *guardian* and ward; and the like actions *mutatis mutandis*, as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him. And though guardianship in chivalry is now totally abolished, which was the only beneficial kind of guardianship to the guardian, yet the guardian in socage was always and is still entitled to an action of *ravishment*, if his ward or pupil be taken from him; but then he must account to his pupil for the damages which he so recovers. And, as a guardian in socage was also entitled at common law to a writ of right of ward, *de custodia terrae et haeredis*, in order to recover the possession and custody of the infant, so I apprehend that he is still entitled to sue out this antiquated writ. But a more speedy and summary method of redressing all complaints relative to wards and guardians hath of late obtained by an application to the court of chancery; which is the supreme guardian, and has the superintendent jurisdiction, of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II. c. 24 that testamentary guardians may maintain an action of ravishment or trespass, for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants.

IV. To the relation between *master* and *servant*, and the rights accruing therefrom, there are two species of injuries incident. The one is, retaining a man's hired servant before his time is expired; the other is, beating or confining him in such a manner that he is not able to perform his work. As to the first, the retaining another person's servant during the time he has agreed to serve his present

master; this, as it is an ungentlemanlike, so it is also an illegal, act. For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a special action on the case and he may also have an action against the servant for the nonperformance of his agreement. But, if the new master was not apprised of the former contract, no action lies against *him*, unless he refuses to restore the servant, upon demand. The other point of injury is that of beating, confining, or disabling a man's servant, which depends upon the same principle as the last; viz., the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of *trespass vi et armis;* in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit;* and then the jury will make him a proportionable pecuniary satisfaction. A similar practice to which we find also to have obtained among the Athenians; where masters were entitled to an action against such as beat or ill treated their servants.

We may observe that in these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture. Yet the wife or the child, if the husband or parent be slain, have a peculiar species of criminal prosecution allowed them, in the nature of a civil satisfaction; which is called an *appeal*, and which will be considered in the next book. And so the servant, whose master is disabled does not thereby lose his maintenance or wages. He had no property in his master; and if he receives his

part of the stipulated contract, he suffers no injury, and is therefore entitled to no action, for any battery or imprisonment which such master may happen to endure.

WARREN AND BRANDEIS, THE RIGHT TO PRIVACY, 4 Harvard Law Rev. 193, 193-196, 206-207.

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually, the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,— the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally, the law halted,—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an

adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago, directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is over-stepping in every direction the obvious bounds of propriety, and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste, the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon

advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

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If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from

the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the deliberate expression of thoughts and emotions in literary or artistic compositions, and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort. This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person,— the right to one's personality.

BLACKSTONE, COMMENTARIES, III, 145-154.

I. The rights of personal property in *possession* are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into two branches; the unjust and unlawful *taking* them away; and the unjust *detaining* them, though the original taking might be lawful.

1. And first of an unlawful taking. The right of property in all external things being solely acquired by occupancy, as has been

formerly stated, and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows, as a necessary consequence, that when I have once gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be a sufficient title, all property would soon be confined to the most strong, or the most cunning; and the weak and simple-minded part of mankind (which is by far the most numerous division) could never be secure of their possessions.

The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by an action of replevin.

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In like manner, other remedies for other unlawful takings of a man's goods consist only in recovering a satisfaction in damages. And if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury, which though it doth not amount to felony unless it be done *animo furandi*, is nevertheless a trangression for which an action of *trespass vi et armis* will lie; wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it. Or, if committed without force, the party may, at his choice, have another remedy in damages by action of *trover* and *conversion*. . . . .

2. Deprivation of possession may also be an unjust *detainer* of another's goods, though the original *taking* was lawful. As if I distrain another's cattle damage-feasant, and before they are impounded, he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them; in which he shall recover damages only for the *detention* and not for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining and not in the original taking, and the regular method for me to

recover possesssion is by action of *detinue*. In this action of detinue it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like, for that cannot be known from other money or corn, unless it be in a bag or a sack, for then it may be distinguishably marked. In order therefore to ground an action of detinue, which is only for the *detaining*, these points are necessary: 1. That the defendant came lawfully into possession of the goods as either by delivery to him, or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional; that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. . . .

The action itself is of late much disused, and has given place to the action of trover.

This action of *trover* and *conversion* was in its original an action of trespass upon the case, for the recovery of damages against such person as had *found* another's goods and refused to deliver them on demand, but *converted* them to his own use; from which finding and converting it is called an action of *trover* and *conversion*. The freedom of this action from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of *detinue*, that by a fiction of law, actions of *trover* were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded. The injury lies in the conversion; for any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property therein, unless the owner be forever unknown: and therefore he must not convert them to his own use, which the law presumes him to do if he refuses them to the owner: for which reason such refusal also is, *prima facie*, sufficient evidence of a conversion. The fact of the finding or *trover* is therefore now totally immaterial; for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he proves that the goods are *his* property and that the defendant had them in his possession, it is sufficient. But a

conversion must be fully proved; and then in this action the plaintiff shall recover damages, equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*.

As to the damage that may be offered to things personal while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels or making them in a worse condition than before, these are injuries too obvious to need explication. I have only therefore to mention the remedies given by the law to redress them, which are in two shapes ; by action of *trespass vi et armis*, where the act is in itself *immediately* injurious to another's property, and therefore necessarily accompanied with some degree of force; and by special action *on the case*, where the act is in itself indifferent, and the injury only *consequential*, and therefore arising without any breach of the peace. In both of which suits the plaintiff shall recover damages, in proportion to the injury which he proves that his property has sustained. And it is not material whether the damage be done by the defendant himself, or his servants by his direction; for the action will lie against the master as well as the servant. And, if a man keeps a dog or other brute animal, used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences, if he knows of such evil habit.

BLACKSTONE, COMMENTARIES, III, 208–215.

In the two preceding chapters we have considered such injuries to real property as consisted in an ouster or amotion of possession. Those which remain to be discussed are such as may be offered to a man's real property without any amotion from it.

The second species, therefore, of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of *trespass*. Trespass, in its largest and most extensive sense, signifies any transgression or offense against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. Therefore, beating another is a trespass, for which (as we have formerly seen) an action of *trespass vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively trespasses, for which an action of *trespass vi et armis*, or on the case in trover and conversion, is given by the law, so also, non-performance of promises or undertakings is a trespass, upon which an action of trespass on the case in *assumpsit*

is grounded; and, in general, any misfeasance or act of one man whereby another is injuriously treated or damnified is a transgression or trespass in its largest sense: for which we have already seen that whenever the act itself is directly and immediately injurious to the person or property of another, and therefore necessarily accompanied with some force, an action of *trespass vi et armis* will lie; but, if the injury is only consequential, a special action of trespass *on the case* may be brought.

But, in the limited and confined sense in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property in lands, being once established, it follows as a necessary consequence that this right must be exclusive; that is that the owner may retain to himself the sole use and occupation of his soil: every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman laws seem to have made a direct prohibition necessary in order to constitute this injury: "*qui alienum fundum ingreditur, potest a domino, si is praeviderit, prohiberi ne ingrediatur.*" But the law of England, justly considering that much inconvenience may happen to the owner before he has an opportunity to forbid the entry, has carried the point much further, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie; but determines the *quantum* of that satisfaction, by considering how far the offense was wilful, or inadvertent, and by estimating the value of the actual damage sustained.

Every unwarrantable entry on another's soil, the law entitles a trespass by *breaking his close;* the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.* For every man's land is, in the eye of the law, enclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal, invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land. Thus, if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes: for they have an exclusive interest and freehold therein for the time. But before entry and actual possession one cannot maintain an action of trespass, though he hath the freehold in law. And therefore an heir before entry cannot have this action against an abator; though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land; but he cannot have it for any act done after the disseisin until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for after his re-entry the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him. Neither by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer by a mode of redress which was calculated merely for injuries committed against the land while *in the possession* of the owner. . . .

A man is answerable for not only his own trespass, but that of his cattle also; for, if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on) and they there tread down his neighbor's herbage and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus *damage-feasant*, or doing damage, till the owner shall make him satisfaction, or else by leaving him to the common remedy *in foro contentioso*, by action. And the action that lies in either of these cases of trespass committed upon another's land either by a man himself or his cattle is, the action of *trespass vi et armis*, whereby a man is called upon to answer *quare vi et armis clausum ipsius, A., apud B., fregit, et blada ipsius A., ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, etc.:* for the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the

plaintiff must recover some damages; such, however, as the jury shall think proper to assess. . . .

In some cases trespass is justifiable, or, rather, entry on another's land or house shall not in those cases be accounted trespass; as if a man comes thither to demand or pay money there payable, or to execute in a legal manner the process of the law. Also, a man may justify entering into an inn or public house without the leave of the owner first specially asked, because when a man professes the keeping such inn or public house he thereby gives a general license to any person to enter his doors. So a landlord may justify entering to distrain for rent; a commoner, to attend his cattle commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing. Also, it hath been said that, by the common law and custom of England, the poor are allowed to enter and glean upon another's ground after the harvest, without being guilty of trespass: which humane provision seems borrowed from the Mosaical law.

In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land, because the destroying such creatures is said to be profitable to the public. But in cases where a man misdemeans himself or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio:* as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner; this wrongful act shall affect and have relation back, even to his first entry, and make the whole a trespass. But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him. So, if a landlord distrained for rent and wilfully killed the distress, this, by the common law, made him a trespasser *ab initio:* and so, indeed, would any other irregularity have done, till the statute 11 Geo. II c. 19, which enacts that no subseqent irregularity of the landlord shall make his first entry a trespass; but the party injured shall have a special action of trespass or on the case, for the real specific injury sustained, unless tender of amends hath been made. But still, if a reversioner, who enters on pretense of seeing waste, breaks the house, or stays there all night; or if the commoner who comes to tend his cattle cuts down a tree; in these and similar cases the law judges that he entered for this unlawful purpose, and therefore, as the act which

demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*. So also, in the case of hunting the fox or badger, a man cannot justify breaking the soil and digging him out of his earth; for though the law warrants the hunting of such noxious animals for the public good, yet it is held that such things must be done in an ordinary and usual manner; therefore, as there is an ordinary course to kill them, viz., by hunting, the court held that the digging for them was unlawful.

A man may also justify in an action of trespass, on account of the freehold and right of entry being in himself; and this defense brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed.

CHAPTER XI

OBLIGATIONS[1]

HOLLAND, JURISPRUDENCE, Chap. XII.

An obligation, as its etymology denotes, is a tie whereby one person is bound to perform some act for the benefit of another. In some cases the two parties agree thus to be bound together, in other cases they are bound without their consent. In every case it is the law which ties the knot, and its untying, "*solutio*," is competent only to the same authority. There are cases in which a merely moral duty, giving rise to what is called a "natural," as opposed to a "civil," obligation, will incidentally receive legal recognition. So if a person who owes a debt pays it in ignorance that it is barred by the statutes of limitation, he will not be allowed to recover it back.

The right which, looked at from the point of view of the law which imposes it, is described as an obligation, is described, from the point of view of the person of inherence, as a "*jus in personam*." The difference between a right of this kind and of the kind discussed in the preceding chapter is obvious enough.

When a man owns an estate, a general duty is laid upon all the world to refrain from trespassing on his land. If he contracts with a landscape gardener to keep his grounds in order for so much a year, then the gardener owes to the landowner a special duty, over and above the duty owed to him by all the world besides. If a surgeon is practising in a town, while there is a duty incumbent on all not to intimidate patients from resorting to him, or otherwise molest him in the exercise of his profession, there is no general duty not to compete for his practice. Any one may legally establish a rival surgery next door. Suppose, however, that the surgeon has bought his business from a predecessor, who, in consideration of being well paid, has covenanted not to practise within twenty miles of the town in question. Here the predecessor, beyond and

[1] Maine, Ancient Law (American ed.) 306–314; Markby, Elements of Law, §§ 624–663; Salmond, Jurisprudence, §§ 180–185.

above the duties owed by others to his successor, owes him the special duty of not competing with him by the exercise of his profession in the neighborhood. In the cases supposed, the landowner and the practising surgeon have respectively rights "*in personam*," against the gardener and the retired surgeon, over and above the rights "*in rem*" which they enjoy as against every one else.

Most frequently antecedent rights "*in personam*" arise, as in the above cases, out of the agreement of the parties. They are, however, often due to some cause with which the parties have nothing to do. In these cases, although the person of incidence has not undertaken a special duty to the person of inherence, yet the Law casts that duty upon him, as if he had so undertaken it. There is a ligeance between two individuals, although the chain that binds them was not linked by their own hands. Every one has, for instance, a right that public ministerial officers, such as sheriffs, registrars, or postmen, shall exercise their functions for his benefit when occasions arise entitling him to their services. Similar rights "*in personam*" are enjoyed against persons filling certain private fiduciary positions, such as trustees, executors, administrators, and trustees of bankrupts. So also against persons who happen to enter into certain transitory relations with others, such as persons to whom money has been paid by mistake, or whose affairs have been managed by a "*negotiorum gestor*." Finally, against persons who occupy certain family relationships to others, *e. g.*, against wives and children, and *vice versa* against husbands and parents.

ANSON, CONTRACTS, Pt. I, § 2.

Obligation is a legal bond whereby constraint is laid upon a person or group of persons to act or forbear on behalf of another person or group.

Its characteristics seem to be these.

1. A control. It consists in a control exercisable by one or both of two persons or groups over the conduct of the other. They are thus bound to one another, by a tie which the Roman lawyers called *vinculum juris*, which lasts, or should last, until the objects of the control are satisfied, when their fulfillment effects a *solutio obligationis*, an unfastening of the legal bond. That this unfastening may take place in other ways than by fulfillment will be shown hereafter.

2. Two definite parties. Such a relation as has been described necessitates two parties, and these must be definite.

There must be two, for a man cannot be under an obligation to himself, or even to himself in conjunction with others. Where a man borrowed money from a fund in which he and others were jointly interested, and covenanted to repay the money to the joint account, it was held that he could not be sued upon his covenant. "The covenant to my mind is senseless," said Pollock, C. B. "I do not know what is meant in point of law by a man paying himself."

And the persons must be definite. A man cannot be obliged or bound to the entire community: his liabilities to the political society of which he is a member are matter of public or criminal law. Nor can the whole community be under an *obligation* to him: the right on his part correlative to his liabilities aforesaid would be a right *in rem*, would be in the nature of property as opposed to obligation. The word obligation has been unfortunately used in this sense by Austin and Bentham as including the general duty, which the law imposes on all, to respect such rights as the law sanctions. Whether the right is to personal freedom or security, to character, or to those more material objects which we commonly call property, it imposes a corresponding duty on all to forbear from molesting the right. Such a right is a right *in rem*. But it is of the essence of obligation that the liabilities which it imposes are imposed on definite persons, and are themselves definite: the rights which it creates are rights *in personam*.

3. Definite liabilities. The liabilities of obligation relate to definite acts or forbearances. The freedom of the person bound is limited only in reference to some particular act or series or class of acts. A general control over the conduct of another would affect his status as a free man, but obligation, as was said by Savigny, is to individual freedom what *servitus* is to *dominium*. One may work out the illustration thus: I am owner of a field; my proprietary rights are general and indefinite; my neighbor has a right of way over my field; my rights are to that extent curtailed by his, but his rights are very definite and special. So with obligation. My individual freedom is generally unlimited and indefinite. As with my field so with myself, I may do what I like with it so long as I do not infringe the rights of others. But if I contract to do work for A by a certain time and for a fixed reward, my general freedom is abridged by the special right of A to the performance by me of the stipulated work, and he too is in like manner obliged to receive the work and pay the reward.

4. Reducible to a money value. The matter of the obligation, the thing to be done or forborne, must possess, at least in the eye of the law, a pecuniary value, otherwise it would be hard to distinguish legal from moral and social relations. Gratitude for a past kindness cannot be measured by any standard of value, nor can the annoyance or disappointment caused by the breach of a social engagement; and courts of law can only deal with matters to which the parties have attached an importance estimable by the standard of value current in the country in which they are.

Obligation then is a control exercisable by definite persons over definite persons for the purpose of definite acts or forbearances reducible to a money value.

1. OBLIGATIONS ARISING FROM LEGAL TRANSACTIONS

SALMOND, JURISPRUDENCE, §§ 121–123.

Acts in the law are of two kinds, which may be distinguished as *unilateral* and *bilateral*. A unilateral act is one in which there is only one party whose will is operative; as in the case of testamentary disposition, the exercise of a power of appointment, the revocation of a settlement, the avoidance of a voidable contract, or the forfeiture of a lease for breach of covenant. A bilateral act, on the other hand, is one which involves the consenting wills of two or more distinct parties; as, for example, a contract, a conveyance, a mortgage, or a lease. Bilateral acts in the law are called *agreements* in the wide and generic sense of that term. There is, indeed, a narrow and specific use, in which agreement is synonymous with *contract*, that is to say, the creation of rights *in personam* by way of consent. The poverty of our legal nomenclature is such, however, that we cannot afford thus to use these two terms as synonymous. We shall therefore habitually use agreement in the wide sense, to include all bilateral acts in the law, whether they are directed to the creation, or to the transfer, or to the extinction of rights. In this sense conveyances, mortgages, leases, or releases are agreements no less than contracts are.

Unilateral acts in the law are divisible into two kinds in respect of their relation to the other party concerned. For in some instances they are adverse to him; that is to say, they take effect not only without his *consent*, but notwithstanding his *dissent*. His will is wholly inoperative and powerless in the matter. This is so, for

example, in the case of a re-entry by a landlord upon a tenant for breach of covenant; or the exercise of a power of appointment, as against the persons entitled in default of appointment; or the avoidance of a voidable contract; or the exercise by a mortgagee of his power of sale. In other cases it is not so; the operation of the unilateral act is subject to the dissent of the other party affected by it, though it does not require his consent. In the meantime, pending the expression of his will, the act has merely a provisional and contingent operation. A will, for example, involves nothing save the unilateral intent and assent of the testator. The beneficiaries need know nothing of it; they need not yet be in existence. But if they subsequently dissent, and reject the rights so transferred to them, the testament will fail of its effect. If, on the other hand, they accept the provisions made on their behalf, the operation of the will forthwith ceases to be provisional and becomes absolute. Similarly a settlement of property upon trust need not be known or consented to *ab initio* by the beneficiaries. It may be a purely unilateral act, subject, however, to repudiation and avoidance by the persons intended to be benefited by it. So I may effectually grant a mortgage or other security to a creditor who knows nothing of it.

Where there are more than two parties concerned in any act in the law, it may be bilateral in respect of some of them and unilateral in respect of others. Thus a conveyance of property by A to B in trust for C may be bilateral as to A and B *inter se* — operating by the mutual consent of these two — while it may at the same time be unilateral as between A and B on the one side and C on the other — C having no knowledge of the transaction. So the exercise of a mortgagee's power of sale is bilateral as between mortgagee and purchaser, but unilateral so far as regards the mortgagor.

Of all vestitive facts, acts in the law are the most important; and among acts in the law, agreements are entitled to the chief place. Unilateral acts are comparatively infrequent and unimportant. The residue of this chapter will therefore be devoted to the consideration of the grounds, modes, and conditions of the operation of agreement as an instrument of the creation, transfer, and extinction of rights. A considerable portion of what is to be said in this connection will, however, be applicable *mutatis mutandis* to unilateral acts also.

The importance of agreement as a vestitive fact lies in the universality of its operation. There are few rights which cannot

be acquired through the assent of the persons upon whom the correlative duties are to be imposed. There are few rights which cannot be transferred to another by the will of him in whom they are presently vested. There are few which are not extinguished when their owner no longer desires to retain them. Of that great multitude of rights and duties of which the adult member of a civilized community stands possessed, the great majority have their origin in agreements made by him with other men. By agreements of contrary intent he may strip himself almost as destitute of rights and duties, as when in the scantiest of juridical vesture he made his first appearance before the law. *Invito beneficium non datur*, said the Romans.

By what reasons, then, is the law induced to allow this far reaching operation to the fact of agreement? Why should the mere consent of the parties be permitted in this manner to stand for a title of right? Are not rights the subject-matter of justice, and is justice a mere matter of convention varying with the wills of men?

The reasons are two in number. Agreement is in the first place evidential of right, and in the second place constitutive of it. There is in general no better evidence of the justice of an arrangement than the fact that all persons whose interests are affected by it have freely and with full knowledge consented to it. Men are commonly good judges of their own interests, and in the words of Hobbes "there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contented with his share." When, therefore, all interests are satisfied, and every man is content, the law may safely presume that justice has been done, and that each has received his own. The determination of the law is needed only in default of the agreement of the parties. Hence it is, that he who agrees with another in any declaration of their respective rights and duties will not be suffered to go back from his word, and will not be heard to dispute the truth of his declaration. The exceptions to this rule are themselves defined by equally rigid rules; and he who would disclaim a duty which he has thus imposed upon himself, or reclaim a right which he has thus transferred or abandoned, must bring himself within one of those predetermined exceptions. Otherwise he will be held bound by his own words.

This conclusive presumption of the truth of consensual declaration of right is, however, only one of the foundations of the law of agreement. Consent is in many cases truly constitutive of right, instead of merely evidential of it. It is one of the leading principles

of justice to guarantee to men the fulfillment of their reasonable expectations. In all matters that are otherwise indifferent, expectation is of predominant influence in the determination of the rule of right, and of all the grounds of rational expectation there is none of such general importance as mutual consent. "The human will," says Aquinas, "is able by way of consent to make a thing just; provided that the thing is not in itself repugnant to natural justice."

There is an obvious analogy between agreement and legislation — the former being the private and the latter the public declaration and establishment of rights and duties. By way of legislation the state does for its subjects that which in other cases it allows them to do for themselves by way of agreement. As to the respective spheres of these two operations, the leading maxim is "*Modus et conventio vincunt legem.*" Save when the interests of the public at large demand a different rule, the autonomy of consenting parties prevails over the legislative will of the state. So far as may be, the state leaves the rule of right to be declared and constituted by the agreement of those concerned with it. So far as possible, it contents itself with executing the rules which its subjects have made for themselves. And in so doing it acts wisely. For in the first place, the administration of justice is enabled in this manner to escape, in a degree not otherwise attainable, the disadvantages inherent in the recognition of rigid principles of law. Such principles we must have; but if they are established *pro re nata* by the parties themselves, they will possess a measure of adaptability to individual cases which is unattainable by the more general legislation of the state itself. Amid the infinite diversities and complexities of human affairs the state wisely despairs of truly formulating the rules of justice. So far as possible, it leaves the task to those who by their nearness to the facts are better qualified for it. It says to its subjects: Agree among yourselves as to what is just in your individual concerns, and I shall enforce your agreement as the rule of right.

In the second place, men are commonly better content to bear the burdens which they themselves have taken up, than those placed upon them by the will of a superior. They acquiesce easily in duties of their own imposition, and are well pleased with rights of their own creation. The law or the justice which best commends itself to them is that which they themselves have made or declared. Wherefore, instead of binding its subjects, the state does well in allowing them to bind themselves.

Agreements are divisible into three classes, for they either create rights or transfer them, or extinguish them. Those which create rights are themselves divisible into two sub-classes, distinguishable as *contracts* and *grants*. A contract is an agreement which creates an obligation or right *in personam* between the parties to it. A grant is an agreement which creates a right of any other description; examples being grants of leases, easements, charges, patents, franchises, powers, licenses, and so forth. An agreement which transfers a right may be termed generally an *assignment*. One which extinguishes a right is a *release*, *discharge*, or *surrender*.

As already indicated, a contract is an agreement intended to create a right *in personam* between the contracting parties. No agreement is a contract unless its effect is to bind the parties to each other by the *vinculum juris* of a newly created personal right. It commonly takes the form of a promise or set of promises. That is to say, a declaration of the consenting wills of two persons that one of them shall henceforth be under an obligation to the other naturally assumes the form of an undertaking by the one with the other to fulfill the obligation so created. Not every promise, however, amounts to a contract. To constitute a contract there must be not merely a promise to do a certain act, but a promise, express or implied, to do this act as a legal duty. When I accept an invitation to dine at another man's house, I make him a promise, but enter into no contract with him. The reason is that our wills, though consenting, are not directed to the creation of any legal right or to any alteration of our legal relations towards each other. The essential form of a contract is not: I promise this to you; but: I agree with you that henceforth you shall have a legal right to demand and receive this from me. Promises that are not reducible to this form are not contracts. Therefore the consent that is requisite for the creation of rights by way of contract is essentially the same as that required for their transfer or extinction. The essential element in each case is the express or tacit reference to the legal relations of the consenting parties.

(a) *Contracts*

HOLLAND, JURISPRUDENCE, Chap. XII.

We are concerned in the present chapter only with that narrower, and more usual, sense of the term contract, which restricts it to signify such a two-sided act as gives rise to rights *in personam*.

In this sense it is defined by Savigny as the "union of several in an accordant expression of will, with the object of creating an obligation between them," by an old English authority as a "speech between two parties whereby something is to be done;" by Pothier as "*l'espèce de convention qui a pour objet de former quelque engag ment*"; by M. Ahrens as "*le consentement exprimé de plusieurs personnes à l'effet de créer entre elles un rapport obligatoire sur un objet de droit.*" "When," said Vice-Chancellor Kindersley, "both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then an agreement or contract between the two is constituted." It is an expression of agreement entered into by several, by which rights "*in personam*" are created available against one or more of them. . . . .

It is necessary carefully to distinguish between the two-sided act itself and the results to which it gives rise. The act alone is the contract, the resulting contractual relation is quite a different thing; although, from the want of an appropriate terminology, the two things are sometimes confused with one another in English law. Thus we talk of "assigning a contract," while what is really meant is the assignment of the rights and liabilities which arise out of the contract. In the language of Roman law, the two ideas are distinguished with the utmost precision. The "*contractus*" is one thing, the "*obligatio ex contractu*" is another. . . . .

The State lends its force to assure the performance of those promises of which it thinks fit to take cognizance. This it endeavors to do by putting some sort of pressure upon the will of the promisor, which is therefore indubitably so far subjected to the will of the promisee. The fact that the pressure thus applied may often fail of its effect has given rise to an ingenious inversion of the theory of contract. According to Mr. Justice Holmes, a contract may be regarded as "the taking of a risk." "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses." But, as the able advocate of this view is compelled to admit, "when people make contracts they usually contemplate the performance rather than the breach"; nor can it be seriously maintained that the performance of a contract is more optional than that of any other legal duty. Libel or assault,

equally with breach of contract, are possible to any one who is prepared to be answerable in damages for the indulgence of a taste for defamation or violence.

An obligatory contract is, as we have seen, a species of agreement. But many agreements produce no legal effect upon the relations of the parties one to another. It will therefore be necessary to enquire more minutely into the characteristics of those consensual acts which are recognized by law as giving rise to obligations.

Savigny's analysis of contract, substantially accepted by the majority of the more recent German authorities, is to the following effect. Its constituent elements are, he says: (*i*) several parties, (*ii*) an agreement of their wills (*sie müssen irgend Etwas, und zwar Beide dasselbe, bestimmt gewolt haben*), (*iii*) a mutual communication of this agreement (*sie müssen sich dieser Uebereinstimmung bewusst geworden seyn, das heisst der Wille muss gegenseitig erklaert worden seyn*), (*iv*) an intention to create a legal relation between the parties.

In one point only does this analysis seem open to criticism. Is it the case that a contract is not entered into, unless the wills of the parties are really at one? Must there be, as Savigny puts it, "a union of several wills to a single, whole and undivided will"? Or should we not rather say that here, more even than elsewhere, the law looks, not at the will itself, but at the will as voluntarily manifested? When the law enforces contracts, it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise.

If, for instance, one of the parties to a contract enters into it, and induces the other party to enter into it, resolved all the while not to perform his part under it, the contract will surely be good, nevertheless. Not only will the dishonest contractor be unable to set up his original dishonest intent as an excuse for non-performance, but should he, from any change of circumstances, become desirous of enforcing the agreement against the other party, the latter will never be heard to establish, even were he in a position to do so, by irrefragable proof, that at the time when the agreement was made, the parties to it were not really of one mind.

(i) *Formal — Specialties.*

DANZ, LEHRBUCH DER GESCHICHTE DES RÖMISCHEN RECHTS, II, sec. 142. The oldest law of the Romans recognized no will as in existence other than the spoken will, the *dictum*. What is not spoken is not willed, and *vice versa*, only that

is willed that is spoken. Therefore, in legal transactions, the words take effect entirely independent of the intention they are to express. The *verba* are efficacious, not merely to the extent that they express the *voluntas*, but, for the law, their literal meaning stands for *voluntas* itself. It does not say: "What thou hast willed and expressed," but only: "What thou hast spoken." Indeed, it is of the essence of the *strictum jus* that intention as such is of no importance. Therefore, in order that the will be directed to an *agere*, all parts of the will must be expressed in speech. It is not enough that the transaction be intended, but there must also be expressed in speech what it is to mean, or it must at least make this meaning recognizable symbolically through a generally known and generally intelligible symbol. The intention which is only to be found by inference is not regarded as existing. It is not enough, therefore, to merely intend a transaction; it must also be designated word for word as such. It is not enough for the fetial to throw his spear into the land of the enemy, but he must say also that he thereby makes war.

BLACKSTONE, COMMENTARIES, III, 154–157.

Express contracts include three distinct species; debts, covenants, and promises.

1. The legal acceptance of *debt* is, a sum of money due by certain and express agreement: as, by a bond for a determinate sum; a bill or note; a special bargain; or a rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it.

The non-payment of these is an injury, for which the proper remedy is by action of debt, to compel the performance of the contract and recover the specifical sum due. This is the shortest and surest remedy; particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me; for this is also a *determinate* contract: but if I agree for no settled price I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal; wherein the sum due is clearly and precisely expressed for, in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First, the defendant has here the same advantage as in action of *detinue*, that of waging his law, or purging himself of the debt by oath, if he thinks proper. Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which therefore, if the proof varies from the claim, cannot be looked upon as the same

contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30 *l.*, I am not at liberty to prove a debt of 20 *l.* and recover a verdict thereon: any more than if I bring an action of *detinue* for a horse, I can thereby recover an ox. For I fail in the proof of that contract, which my action or complaint has alleged to be specific, express, and determinate. But in an action on the case, on what is called an *indebitatus assumpsit*, which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpsit*, and consequently the damages for the breach of it, are in their nature indeterminate; and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. For if *any* debt be proved, however less than the sum demanded, the law will raise a promise *pro tanto*, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30 *l.*, *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please: and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum. And, even in actions of *debt*, where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.

. . . . . .

2. A covenant also, contained in a deed, to do a direct act or to omit one, is another species of express contract, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant; and may be perhaps greatly to the disadvantage and loss of the covenantee. The remedy for this is by a writ of *covenant:* which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant) or show good cause to the contrary: and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby: whereupon the jury will give damages in proportion to the injury sustained by the plaintiff, and occasioned by such breach of the defendant's contract.

HOLMES, COMMON LAW, 271–274.

A charter was simply a writing. As few could write, most people had to authenticate a document in some other way, for instance, by making their mark. This was, in fact, the universal practice in England until the introduction of Norman customs. With them seals came in. But as late as Henry II they were said by the Chief Justice of England to belong properly only to kings and to very great men. I know no ground for thinking that an authentic charter had any less effect at that time when not under seal than when it was sealed. It was only evidence either way, and is called so in many of the early cases. It could be waived, and suit tendered in its place. Its conclusive effect was due to the satisfactory nature of the evidence, not to the seal.

But when seals came into use, they obviously made the evidence of the charter better, in so far as the seal was more difficult to forge than a stroke of the pen. Seals acquired such importance, that, for a time, a man was bound by his seal, although it was affixed without his consent. At last a seal came to be required, in order that a charter should have its ancient effect.

A covenant or contract under seal was no longer a promise well proved; it was a promise of a distinct nature, for which a distinct form of action came to be provided. I have shown how the requirement of consideration became a rule of substantive law, and also why it never had any foothold in the domain of covenants. The exception of covenants from the requirement became a rule of substantive law also. The man who had set his hand to a charter, from being bound because he had consented to be, and because there was a writing to prove it, was now held by force of the seal and by deed alone as distinguished from all other writings. And to maintain the integrity of an inadequate theory, a seal was said to import a consideration.

Nowadays, it is sometimes thought more philosophical to say that a covenant is a formal contract, which survives alongside of the ordinary consensual contract, just as happened in the Roman law. But this is not a very instructive way of putting it either. In one sense, everything is form which the law requires in order to make a promise binding over and above the mere expression of the promisor's will. Consideration is a form as much as a seal. The only difference is, that one form is of modern introduction, and has a foundation in good sense, or at least falls in with our

common habits of thought, so that we do not notice it, whereas the other is a survival from an older condition of the law, and is less manifestly sensible, or less familiar. I may add, that, under the influence of the latter consideration, the law of covenants is breaking down. In many States it is held that a mere scroll or flourish of the pen is a sufficient seal. From this it is a short step to abolish the distinction between sealed and unsealed instruments altogether, and this has been done in some of the western States.

While covenants survive in a somewhat weak old age, and debt has disappeared, leaving a vaguely disturbing influence behind it, the whole modern law of contract has grown up through the medium of the action of *assumpsit*.

POLLOCK, CONTRACTS, Chap. 1.

Except in the case of simultaneous declaration just mentioned, a promise is regularly either the acceptance of an offer or an offer accepted. Where the promise is embodied in a deed, there is an apparent anomaly; for the deed is irrevocable and binding on the promisor from the moment of its execution by him, even before any acceptance by the promisee. But this depends on the peculiar nature of a deed in our law. The party who sets his hand and seal to a deed witnessing his promise does not, strictly speaking, thereby create an obligation, but rather declares himself actually bound, under normal conditions. In fact it is only in modern times that special defenses, on the ground of fraud and the like, have been allowed to avail a man against his own deed. Thus the questions of consent and acceptance are not open, as ordinary questions of fact, to any discussion. The party has recorded his own promise in solemn form, and cannot require proof that any other positive condition was satisfied. As matter of history, the very object of the Anglo-Norman writing under seal was to dispense with any other kind of proof, and to substitute the authenticated will of the parties themselves for an appeal to the hazards of oath, ordeal, or judicial combat. It is not that an anomalous liability is created; the contracting party is estopped (special and exceptional causes excepted) from disputing that he is liable. Not the promise, but the deed itself, is irrevocable and operative without need of external confirmation. Whether it is convenient, on the whole, for the purposes of modern law to retain the deed with its ancient qualities is a question beyond our present limits.

AMES, SPECIALTY CONTRACTS AND EQUITABLE DEFENSES, 9 Harv. Law Rev. 49-50.

It has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman *stipulatio*, owes its validity to the mere fact of its formal execution. The true nature of a specialty as a formal contract was clearly stated by Bracton:—

"*Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se debere.*"

Bracton's statement is confirmed by a decision about a century later. The action was debt upon a covenant to pay £100 to the plaintiff upon the latter's marrying the defendant's daughter. It was objected that this being a debt upon a covenant touching marriage was within the jurisdiction of the spiritual court. But the common-law judges, while conceding the exclusive jurisdiction of the spiritual court if the promise had been by parol, gave judgment for the plaintiff, because this action was founded wholly upon the deed. In another case it is said: "In debt upon a contract the plaintiff shall show in his count for what consideration (*cause*) the defendant became his debtor. Otherwise in debt upon a specialty (*obligation*), for the specialty is the contract in itself."

The specialty being the contract itself, the loss or destruction of the instrument would logically mean the loss of all the obligee's rights against the obligor. And such was the law. "If one loses his obligation, he loses his duty." "Where the action is upon a specialty, if the specialty is lost, the whole action is lost." The injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, which, in the seventeeth century, upon the obligee's affidavit of the loss or destruction of the instrument, compelled the obligor to perform his moral duty. A century later the common-law judges, not to be outdone by the chancellors, decided, by an act of judicial legislation, that if profert of a specialty was impossible by reason of its loss or destruction, the plaintiff might recover, nevertheless, upon secondary evidence of its contents.

AMES, CASES ON BILLS AND NOTES, II, 872–3.

The term "specialty" is applied to an instrument which becomes effective by the mere fact of its formal execution. There are two classes of specialty contracts in the English law,— common law specialties and mercantile specialties. The first class includes bonds and covenants, *i.e.*, instruments under seal; the second class includes bills and notes, and policies of insurance, and possibly other mercantile instruments.

There is a prevalent notion, traceable to an opinion given in the House of Lords in 1778, in the case of *Rann* v. *Hughes*, 7 T. R. 350, n., that only contracts under seal can be specialties, all other contracts, whether written or oral, being merely simple contracts. The fallacy of this notion is easily demonstrable by an examination of the resemblances between bills and notes and instruments under seal, on the one hand, and the differences between bills and notes and simple contracts, on the other hand, in those points in which specialties and simple contracts most strikingly differ from each other.

The points of resemblance and difference may be considered under the following heads, namely,

I. None but parties to a bill can be parties to an action thereon.
II. A bill is treated as a specialty in pleading.
III. A bill operates as a merger of a pre-existing claim.
IV. A bill requires no consideration.
V. The law of mutual assent, as applied to simple contracts, is inapplicable to a bill.
VI. A bill is not within the purview of the section of the statute of frauds which relates to guaranties.
VII. A bill is a chattel.
VIII. A bill is extinguished in the same mode as a bond.

NEGOTIABLE INSTRUMENTS LAW, § 1.

An instrument to be negotiable must conform to the following requirements:—

1. It must be in writing and signed by the maker or drawer;
2. Must contain an unconditional promise or order to pay a sum certain in money;
3. Must be payable on demand, or at a fixed or determinable future time;
4. Must be payable to order or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

(ii) *Real — Debt, Bailment.*[1]

WÄCHTER, PANDEKTEN, II, sec. 184, C. c. *Obligationes quae re contrahuntur.* These are contracts in which one is bound in an actionable obligation by this fact, *that he has received something*, to redeliver what he has received. These contracts are *mutuum, commodatum, depositum, pignus.* In the three last, the concrete things received, that is, the species, are to be redelivered at the proper time; in the case of the *mutuum*, on the other hand, not the concrete things received, but satisfactory things of the same kind and worth and in like quantity are to be redelivered *tantundem.* In these cases, the actionable obligation arises solely from this, that one has received the subject of the obligation; but it arises only so far as one has actually received. Therefore, the Romans say the obligation is contracted *re*, that is, the actionable obligation is here founded and its beginning determined only through the performance received. Hence we call these contracts real contracts.

LANGDELL, SUMMARY OF CONTRACTS, §§ 99–101.

99. The original and normal mode of creating a debt was by a loan of money. In that transaction, therefore, the true nature of a debt must be sought. The subject of a loan may be either a specific thing, as a horse, or a given quantity of a thing which consists in number, weight, or measure, as money, sugar or wine. In the former case, it is of the essence of the transaction that the thing lent continue to belong to the lender; otherwise the transaction is not a loan. In the latter case, the thing lent may (and commonly does) cease to belong to the lender, and become the property of the borrower, such a loan commonly being an absolute transfer of title in the thing lent from the lender to the borrower. The reason why such a transfer takes place is obvious. The object of borrowing is to have the use of the thing borrowed; but the use of things which consist in number, weight, or measure commonly consumes them; and this use, of course, the borrower cannot have unless he owns the things used. When such things are lent, therefore, it is presumed to be the intention of both parties, in the absence of evidence to the contrary, that the borrower shall acquire the title to them. But why then call the transaction a loan? The answer is that, in every particular except the transfer of title, it is a loan; that the title is transferred for the purpose of making the loan effective as such, and because it is immaterial to the lender whether he receives back the identical thing lent, or something else just like it. Moreover, the difference between a loan of money, for example, and a loan of a specific article, is not commonly present

[1] Holmes, Common Law, Lect. V.

to the minds of the parties; the lender of money thinks the money lent still belongs to him, and that the borrower has acquired only the right to use it temporarily; he is aware that the borrower is entitled to transfer to other persons the identical coins lent, and that he has the option of returning to him, the lender, either the identical coins borrowed, or others like them; but he is not aware that these rights in the borrower are inconsistent with his retaining the title to the money lent. In other words, he supposes (and, in every view except the strict legal view, he is right in supposing) that he may own a given sum of money without owning any specified coins; and that the only substantial difference between money in his own coffer and money due to him is, that in the former case he has the possession, while in the latter case he has not.

100. A debt, therefore, according to the popular conception of the term, is a sum of money belonging to one person (the creditor), but in the possession of another (the debtor). There is also much reason to believe that this popular conception of a debt was adopted by the early English law, at least for certain purposes. Thus, the action of debt (which was established for the sole and exclusive purpose of recovering debts of every description) was in the nature of an action *in rem*, and did not differ in substance from the action of detinue; the chief difference between them being that the latter was for the recovery of specified things belonging to the plaintiff, the former, of things not specified. This would tend to the conclusion that the legal mode of creating a debt is not by contract, but by grant, *i.e.* by the transfer of a sum of money from the debtor to the creditor without delivering possession; and it is a confirmation of this view that a debt clearly may be so created. Thus, an annuity, which is simply a debt payable in equal annual installments, has always been regularly created by grant; and there can be no doubt that an ordinary debt may be created by a mere deed of grant. But it would be too much to undertake to account in this way for all debts which may be created by the acts of parties; for, in the first place, a mere covenant (i.e. a promise under seal) to pay a certain sum of money will clearly create a debt; secondly, it is clear enough that a debt cannot be created by grant without a deed; thirdly, it would seem to be straining the facts to say that every loan of money is, in its legal operation, an exchange of the sum lent for a like sum to be paid in future by the borrower, and that every executed sale upon credit is a like exchange of the property sold for the purchase-money to be paid at a future day; fourthly,

there has never been supposed to be any grant or conveyance on the part of a borrower in case of a loan, or on the part of a buyer in case of a sale, but, on the contrary, it has always been supposed that the debt in both cases was created (in the only other possible mode, namely) by contract. Yet this latter view is not without its difficulties. That a debt cannot be created by a mere binding promise on the part of a debtor, without the receipt by him from the creditor of a supposed equivalent for the debt, is clear: First, until the introduction of the action of *assumpsit* (which was not earlier than the latter half of the fifteenth century) such promises were not enforceable by law at all. Secondly, an action of debt will never lie on a bilateral contract not under seal; but if the promise on one side be merely for the payment of money, an action of debt will generally lie to recover the money as soon as the promise on the other side is performed. For example, a contract of sale will never support an action of debt so long as it remains executory on both sides, but as soon as the title to the property sold passes to the buyer, debt will lie for the price. It is clear, therefore, that it is the transfer of the property for a certain price, and not the previous executory contract, that creates the debt. The transfer may also take place without any previous executory contract, and yet the debt arises just the same. Thirdly, it is familiar law that an action of debt will not lie on a unilateral promise to pay money unless the promisor has received an equivalent. For example, when A sells goods to B upon credit, and in consideration of the sale, C guarantees the payment of the price, an action of debt will not lie against C. The result, therefore, is, that a debt cannot be created by contract unless either the contract is under seal or the debtor has received an equivalent, commonly termed a *quid pro quo*. But what kind of contract is that in which the obligation arises not from a promise, but from the receipt of an equivalent for the obligation by the obligor from the obligee? Upon examining the two classes into which contracts are commonly divided, viz. those under seal and those not under seal, it will be seen that the obligation arises in the former from the performance of certain acts prescribed by law, viz. reducing the promise to writing, sealing the writing, and delivering it; while in the latter, it generally arises from a promise made and accepted, *i.e.* from an exercise of will on the part of the promisor and the promisee, the law imposing only the condition that there shall be some consideration for the promise. According to the nomenclature employed by writers on

the civil law, the former are formal contracts, while the latter are consensual contracts. This distinction existed from the earliest times among the Romans, who allowed certain specified contracts (only four in all) to be made by mere consent, but for all others required some one of three prescribed forms. One of these forms consisted in the delivery of some movable thing by the promisee to the promisor. When this was done with the mutual understanding that either the specific thing delivered or (in case of things which consisted in number, weight, or measure) something else like it should be returned, an obligation to make such return arose immediately upon the delivery. As the contract arose from the delivery of a thing (*re*), it was called a *real* contract. There were four of these contracts from the earliest times; namely, a loan of money or other thing consisting of number, weight, or measure (*mutuum*), a gratuitous loan of specific things (*commodatum*), a delivery of specific things for safe keeping (*depositum*), and a pawn or pledge (*pignus*). At a later period, this species of contracts was so extended as to embrace any transaction which consisted in giving or doing on one side, with the mutual understanding that some specified thing should be given or done on the other side in exchange.

101. There can be little doubt that the Roman law in regard to real contracts was adopted by the English law at a very early period, at least so far as the latter law provided a remedy for enforcing such contracts; and whenever the giving or doing on one side created an obligation on the other side to pay a definite sum of money, the action of debt not only furnished an appropriate means for enforcing the obligation, but it was for that express purpose that the action was established. The testimony of the early writers is very explicit upon this subject. Thus, Glanville enumerates five contracts, all of Roman origin, as creating debts. Three of these were the real contracts of *mutuum*, *commodatum*, and *depositum;* the other two were sale (*venditio*) and letting for hire (*locatio*), meaning a sale or letting which had been executed by a transfer of the thing sold or let. These latter were not regarded as real contracts among the Romans, for the reason that they were binding as consensual contracts, though wholly executory; but, as they were not binding by the English law while executory, they were very properly classed by Glanville among real contracts when executed by a transfer of the property. Bracton, who in this respect is followed by Fleta, and in substance by Britton, follows the *Institutes* of Justinian almost literally upon the

subject of real contracts; and though the closeness of his copying may excite some suspicion as to the trustworthiness of his testimony, yet what he says upon real contracts is quoted as authority by Lord Holt, in *Coggs* v. *Bernard*. It may be added that Britton and Fleta, as well as Glanville, treat of real contracts under the titles "debt" and "action of debt."

COGGS v. BERNARD, King's Bench, 1703 (2 Lord Raym. 909).

Holt, C. J.: The case is shortly this. This defendant undertakes to remove goods from one cellar to another, and there lay them down safely, and he managed them so negligently, that for want of care in him some of the goods were spoiled. Upon not guilty pleaded, there has been a verdict for the plaintiff, and that upon full evidence, the cause being tried before me at Guildhall. There has been a motion in arrest of judgment, that the declaration is insufficient, because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labor. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. In order to shew the grounds, upon which a man shall be charged with goods put into his custody, I must shew the several sorts of bailments. And there are six sorts of bailments. The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a *depositum*, and it is that sort of bailment which is mentioned in *Southcote's case*. The second sort is, when goods or chattels that are useful, are lent to a friend, gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored *in specie*. The third sort is, when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers

them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case. I mention these things, not so much that they are all of them so necessary in order to maintain the proposition which is to be proved, as to clear the reason of the obligation, which is upon persons in cases of trust.

As to the first sort, where a man takes goods in his custody to keep for the use of the bailor, I shall consider for what things such a bailee is answerable. He is not answerable, if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. There is, I confess, a great authority against me, where it is held, that a general delivery will charge the bailee to answer for the goods if they are stolen, unless the goods are specially accepted, to keep them only as you will keep your own. But my Lord Coke has improved the case in his report of it, for he will have it, that there is no difference between a special acceptance to keep safely, and an acceptance generally to keep. But there is no reason nor justice in such a case of a general bailment, and where the bailee is not to have any reward, but keeps the goods merely for the use of the bailor, to charge him without some default in him. For if he keeps the goods in such a case with an ordinary care, he has performed the trust reposed in him. But according to this doctrine the bailee must answer for the wrongs of other people, which he is not, nor cannot be, sufficiently armed against. If the law be so, there must be some just and honest reason for it, or else some universal settled rule of law, upon which it is grounded; and therefore it is incumbent upon them that advance this doctrine, to shew an undisturbed rule and practice of the law according to this position. But to shew that the tenor of the law was always otherwise, I shall give a history of the authorities in the books in this matter, and by them shew, that there never was any such resolution given before *Southcote's case*. The 29 Ass. 28, is the first case in the books upon that learning, and there the opinion is, that the bailee is not chargeable, if the goods are stole. As for 8 Edw. 2, Fitz. Detinue 59, where goods were locked in a chest, and left with the bailee, and the owner took away the key, and the goods were stolen, and it was held that the bailee should not answer for the goods. That case they say differs, because the bailor did not trust the bailee with

them. But I cannot see the reason of that difference, nor why the bailee should not be charged with goods in a chest, as well as with goods out of a chest. For the bailee has as little power over them, when they are out of a chest, as to any benefit he might have by them, as when they are in a chest; and he has as great power to defend them in one case as in the other. The case of 9 Edw. 4, 40 b. was but a debate at bar. For Danby was but a counsel then, though he had been Chief Justice in the beginning of Ed. 4, yet he was removed, and restored again upon the restitution of Hen. 6, as appears by Dugdale's *Chronica Series*. So that what he said cannot be taken to be any authority, for he spoke only for his client; and Genney for his client said the contrary. The case in 3 Hen. 7, 4, is but a sudden opinion and that but by half the Court; and yet that is the only ground for this opinion of my Lord Coke, which besides he has improved. But the practice has always been at Guildhall, to disallow that to be a sufficient evidence, to charge the bailee. And it was practised so before my time, all Chief Justice Pemberton's time, and ever since, against the opinion of that case. When I read *Southcote's case* heretofore, I was not so discerning as my brother Powys tells us he was, to disallow that case at first, and came not to be of this opinion, till I had well considered and digested that matter. Though I must confess reason is strong against the case to charge a man for doing such a friendly act for his friend, but so far is the law from being so unreasonable, that such a bailee is the least chargeable for neglect of any. For if he keeps the goods bailed to him, but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own, is an argument of his honesty. *A fortiori* he shall not be charged, where they are stolen without any neglect in him. Agreeable to this Bracton, lib. 3, c. 2, 99 b. . . . As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen with his own; yet he shall not be charged, because it is the bailor's own folly to trust such an idle fellow. So that this sort of bailee is the least responsible for neglects, and under the least obligation of any one, being bound to no other care of the bailed goods, than he takes of his own. This Bracton I have cited is, I confess, an old author, but in this his doctrine is agreeable to reason, and to what the law is in other countries. The civil law is so, as you have it in Justinian's *Inst.* lib. 3, tit. 15. There the law goes farther. . . . So that a bailee

is not chargeable without an apparent gross neglect. And if there is such a gross neglect, it is looked upon as an evidence of fraud. Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, even that won't charge him with all sorts of neglects. For if such a promise were put into writing, it would not charge so far, even then. Hob. 34, a covenant, that the covenantee shall have, occupy and enjoy certain lands, does not bind against the acts of wrong doers. 3 Cro. 214, acc. 2 Cro. 425, acc. upon a promise for quiet enjoyment. And if a promise will not charge a man against wrong doers, when put in writing, it is hard it should do it more so, when spoken. *Doct. & Stud.* 130, is in point, that though a bailee do promise to re-deliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong doer. So that there is neither sufficient reason nor authority to support the opinion in *Southcote's case;* if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect. As to the second sort of bailment, viz., *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence, to keep the goods, so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect, he will be answerable; as if a man should lend another a horse, to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under, and it may be if the horse had been used no otherwise than he was lent, that accident would not have befallen him. This is mentioned in Bracton. . . . I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary. But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves the occasion to steal the horse. Bracton says, the bailee must use the utmost care, but yet he shall not be chargeable, where there is such a force as he cannot resist.

As to the third sort of bailment, *scilicet locatio* or lending for hire, in this case the bailee is also bound to take the utmost care

and to return the goods, when the time of the hiring is expired. And here again I must recur to my old author, fol. 62 b. . . . From whence it appears, that if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that, he shall be discharged. But every man, how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.

As to the fourth sort of bailment, viz., *vadium* or a pawn, in this I shall consider two things; first, what property the pawnee has in the pawn or pledge, and secondly for what neglects he shall make satisfaction. As to the first, he has a special property, for the pawn is a securing to the pawnee, that he shall be repaid his debt, and to compel the pawner to pay him. But if the pawn be such as it will be the worse for using, the pawnee cannot use it, as cloaths, &c., but if it be such, as will be never the worse, as if jewels for the purpose were pawn'd to a lady, she might use them. But then she must do it at her peril, for whereas, if she keeps them lock'd up in her cabinet, if her cabinet should be broke open, and the jewels taken from thence, she would be excused; if she wears them abroad, and is there robb'd of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit, and as such is not liable to be used. And to this effect is Ow. 123. But if the pawn be of such a nature, as the pawnee is at any charge about the thing pawn'd, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat. As to the second point Bracton 99 b. gives you the answer. . . . In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. Agreeable to this is 29 Ass. 28, and *Southcote's case* is. But indeed the reason given in *Southcote's case* is, because the pawnee has a special property in the pawn. But that is not the reason of the case; and there is another reason given for it in the Book of Assize, which is indeed the true reason of all these cases, that the law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But indeed, if the money for which the goods were pawn'd, be tender'd to the pawnee before they are lost, then

the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrong doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him, is the reason of the loss. Upon the same difference as the law is in relation to pawns, it will be found to stand in relation to goods found.

As to the fifth sort of bailment, viz. a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts; either a delivery to one that exercises a publick employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Mors* v. *Slew*, Raym. 220. 1 Vent. 190, 238. The law charges this person thus intrusted to carry goods, against all events but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point. The second sort are bailies, factors and such like. And though a bailee is to have a reward for his management, yet he is only to do the best he can. And if he be robbed, etc., it is a good account. And the reason of his being a servant is not the thing; for he is at a distance from his master, and acts at discretion, receiving rents and selling corn, etc. And yet if he receives his master's money, and keeps it lock'd up with a reasonable care, he shall not be answerable for it, though it be stolen. But yet this servant is not a domestick servant, nor under his master's immediate care. But the true reason of the case is, it would be unreasonable to charge him with a trust, farther than the nature of the thing puts it in his power to perform it. But it is allowed in the other cases, by reason of the necessity of the thing. The same law of a factor.

As to the sixth sort of bailment, it is to be taken, that the bailee is to have no reward for his pains, but yet that by his ill management the goods are spoiled. Secondly, it is to be understood, that there was a neglect in the management. But thirdly, if it had appeared that the mischief happened by any person that met the cart in the way, the bailee had not been chargeable. As if a drunken man had come by in the streets, and had pierced the cask of brandy; in this case the defendant had not been answerable for it, because he was to have nothing for his pains. Then the bailee, having undertaken to manage the goods, and having managed them ill, and so by his neglect a damage has happened to the bailor, which is the case in question, what will you call this? In Bracton, lib.3, 100, it is called *mandatum*. It is an obligation which arises *ex mandato*. It is what we call in English an acting by commission. And if a man acts by commission for another gratis, and in the executing his commission behaves himself negligently, he is answerable. . . . This undertaking obliges the undertaker to a diligent management. . . . I don't find this word in any other author of our law, besides in this place in Bracton, which is a full authority, if it be not thought too old. But it is supported by good reason and authority.

The reasons are, first, because in such a case, a neglect is a deceipt to the bailor. For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10. 2 Hen. 7, 11, a strong case to this matter. There, the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drown'd by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But, secondly, it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, that the owner's trusting him with the goods is a sufficient consideration to oblige him to a

careful management. Indeed, if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. The 19 Hen. 6, 49, and the other cases cited by my brothers, shew that this is the difference. But in the 11 Hen. 4, 33, this difference is clearly put, and that is the only case concerning this matter, which has not been cited by my brothers. There, the action was brought against a carpenter, for that he had undertaken to build the plaintiff a house within such a time, and had not done it, and it was adjudged the action would not lie. But there the question was put to the Court, what if he had built the house unskilfully, and it is agreed in that case an action would have lain. There has been a question made, if I deliver goods to A. and in consideration thereof he promise to re-deliver them, if an action will lie for not re-delivering them; and in Yelv. 4, judgment was given that the action would lie. But that judgment was afterwards revers'd, and according to that reversal, there was judgment afterwards entered for the defendant in the like case. Yelv. 128. But those cases were grumbled at, and the reversal of that judgment in Yelv. 4, was said by the Judges to be a bad resolution, and the contrary to that reversal was afterwards most solemnly adjudged in 2 Cro. 667, Tr. 21 Jac. 1, in the King's Bench, and that judgment affirmed upon a writ of error. And yet there is no benefit to the defendant, nor no consideration in that case, but the having the money in his possession, and being trusted with it, and yet that was held to be a good consideration. And so a bare being trusted with another man's goods, must be taken to be a sufficient consideration, if the bailee once enter upon the trust, and take the goods into his possession. The declaration in the case of *Mors* v. *Slew* was drawn by the greatest drawer in England in that time, and in that declaration, as it was always in all such cases, it was thought most prudent to put in, that a reward was to be paid for the carriage. And so it has been usual to put it in the writ, where the suit is by original. I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather

have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle. And judgment was given for the plaintiff.

(iii) *Simple.*

All contracts other than those above discussed are called simple contracts and at common law are actionable only in an action of *assumpsit.* They are made up of two elements, offer and acceptance. The acceptance may be in the form of a counter promise or in the form of some other act in exchange for which the offerer proposes to give his promise. Accordingly, simple contracts are of two kinds, (1) unilateral, where the acceptance is some act other than a promise and hence there is a promise upon one side only; (2) bilateral, where the acceptance is itself a promise and hence there is a promise upon each side. The act in the case of a unilateral contract or the promise of the other party in the case of a bilateral contract — in other words, that which is given in exchange for the other's promise, whereby it becomes binding legally — is called "consideration." It must be a detriment to the promisee, a doing by him of something which he is not legally bound to do.

HARRIMAN, CONTRACTS, (2 ed.) §§ 646–652.

Sec. 646. The Modern Theory of Simple Contracts. — While no one theory of contract will apply alike to formal and to simple contracts the courts have worked out a theory of simple contracts which is reasonably consistent and intelligible. This theory is that a promise creates obligation when it calls for certain action by the promisee, and when the promisee takes such action in reliance upon the promise. This may be called the consideration theory of contract, and has its origin in the development of the action of *assumpsit* from the action of deceit for breach of a parol promise. Another theory, having the same origin, is that the promise becomes binding though it calls for no specific action, if the promisee acts reasonably in reliance upon it. This may be called the estoppel theory. It differs from the consideration theory in this that under the former theory the action which the promisee must take to turn the promise into a contract is marked out by the promise itself, while under the latter, any reasonable action by the promisee in reliance upon the promise will turn the promise into a contract. The close connection between the different forms of legal obligation called simple contract, equitable estoppel, and deceit is clearly apparent. All these rest upon this broad ethical principle, that every man is responsible for the natural consequences of his legal acts. If then, the natural consequence of A's act is to produce a particular impression on B's mind, in consequence of which B

naturally does a certain act, A's act renders him responsible, to some extent and with some limitations for B's act. The extent and nature of such responsibility will be illustrated by the following examples.

Sec. 647. Simple Contract — The Consideration Theory. — A says to B, "I will give you $100 for your horse." This statement of A's induces B to believe that A will pay him $100 for the horse. Influenced by this belief, and relying on A's promise, B gives his horse to A. A becomes bound to pay B $100, having induced B to do the act which A's promise called for, and thereby becoming legally responsible for the promise.

Sec. 648. Equitable Estoppel. — A and B own adjoining lots. A says to B, "These two trees mark the boundary line between our lots." The trees are in fact on A's land. A induces B to believe that the trees mark the true boundary line, and in reliance on A's statement, B builds a house which is partly on A's land. A is estopped to deny that the true boundary line is the one he pointed out, having induced B to act in reliance on his statement. To create an estoppel of this character, there must be a representation of existing fact.

Sec. 649. Simple Contract — The Estoppel Theory. — A promises to give $100 to the First Methodist Church. In reliance upon this promise the church buys a new organ. According to some courts, this action of the church makes A's promise binding. Such courts call the action of the church the consideration for A's promise but the strict definition of consideration requires that it should be specifically indicated by the promise itself. The reason for calling this theory the estoppel theory of contract is that this case differs from estoppel only in one particular, viz., that here A's act is a promise instead of a representation of fact.

Sec. 650. Deceit.— A represents to B that the horse which he wishes to sell B is sound. B is induced by his representation to buy the horse. A is liable to B in damages for the injury which he has sustained, at least if A knew that his representation was false.

Sec. 651. The Consensual Theory of Contracts. — While the theory of simple contract in our law is essentially a theory of responsibility for an act which has influenced the conduct of the promisee, another theory has found some place in judicial opinion, and has been advanced by more than one text-writer as the only rational explanation of contractual obligation. That is the consensual theory, which treats contractual obligation as due simply

to the agreement of the parties to the contract. It is obvious, of course, that in almost every contract there is an agreement and a meeting of minds. The real question, however, is not whether there is an agreement, but whether the fact of agreement creates or is essential to the obligation. Now an examination of the authorities shows that a formal contract is enforced because of the weight which the law attaches to the act of sealing and delivering; while a simple promise is enforced only when the promisee has acted in reliance upon it. On the other hand, some essential element of agreement may be lacking, and yet there may be a contract. Fraud and duress, for example, are inconsistent with the idea of agreement. Yet a contract obtained by fraud or duress is not void, but valid until rescinded.

Sec. 652. Summary of the Principles Governing Contractual Obligation at the Present Day. — A proper understanding of the modern law of contracts therefore requires a recognition of the following principls:

First, there is no general theory of contracts to be induced from the English and American decisions.

Second, there is a theory of formal contracts in the common law, resting on the rule that what a man does under his hand and seal he cannot dispute in a court of law.

Third, there is a theory of simple contracts, developed by the slow process of judicial decision through the action of *assumpsit*. The history of this action shows the growth of the idea of contractual obligation from the original idea of tort or deceit. The modern idea of simple contract recognizes contractual obligation as due to the responsibility which the law imposes on one who by his conduct influences the action of another. The idea of simple contract, therefore, appears to be closely connected with the ideas of equitable estoppel and of deceit. The general theory of simple contract is differently applied by different courts, according to their definition of consideration. In one of its branches it appears as the consideration theory; in the other, as the estoppel theory.

Fourth, the idea that contractual obligation has its origin and foundation in the agreement of the parties, has some support in judicial opinion, and the support of some of the leading English and American text-writers. This consensual theory is insufficient to explain our law of contracts, as has been pointed out. It derives its chief force from the vigor with which two leading English writers have indorsed the theories of continental jurists. The

existence of this theory must be recognized, even though its inadequacy as an explanation of our judicial decisions be apparent.

Fifth, there is a strong tendency toward the unification of the theories of formal and of simple contracts. This tendency is due to the constant gain which equitable principles have made and are making over merely technical rules. Its effect is to bring the rules governing formal contracts more and more into harmony with the broad principles governing simple contracts, and, in general, to substitute equitable for legal rules.

LANGDELL, SUMMARY OF CONTRACTS, §§ 46–47.

46. It is a familiar rule of law that contracts not under seal require a consideration to make them binding, while contracts under seal are binding without a consideration; and hence it is commonly inferred that all contracts not under seal are alike in respect to consideration. In one sense this inference is correct, but in another sense it is incorrect. There are two kinds of consideration known to the law, and contracts not under seal may be divided into two classes, according as they are supported by the one or the other of these considerations; and yet either kind of consideration is sufficient to render any contract binding. In other words, all contracts not under seal are alike in respect to the consideration required to make them binding, but whether a contract belongs to the one or the other of the two classes above referred to depends upon the kind of consideration by which it is supported. These two classes of contracts are most easily distinguished by the actions by which they are respectively enforced, the action of debt being the original and proper remedy for one class, and the action of *assumpsit* being the sole remedy for the other class. The former class has existed in our law from time immemorial; the latter class had no legal existence (*i. e.*, they could not be enforced by law) until the introduction of the action of *assumpsit*, it having been originally the sole object of that action to enforce a class of contracts for which there was previously no remedy. In respect to consideration, the former class of contracts requires that the thing given or done, in exchange for the obligation assumed, shall be given or done to or for the obligor directly; that it shall be received by the obligor as the full equivalent for the obligation assumed, and be, in legal contemplation, his sole motive for assuming the obligation; and, lastly, that it shall be actually executed, *i. e.* that the thing to be given or done in exchange for the obligation be actually given or

done, it not being sufficient for the obligee to become bound to do it. Unless there is a consideration which satisfies each of these requirements, debt will not lie; and this is equivalent to saying that there is no binding contract according to the ancient law. Whether there is a binding contract at all, or not, depends upon whether there is such a consideration as will support an action of *assumpsit*. This latter kind of consideration may be best described negatively, namely, by saying that it need not satisfy any one of the requirements before enumerated. If anything whatever (which the law can notice) be given or done in exchange for the promise, it is sufficient; and therefore, if one promise be given in exchange for another promise, there is a sufficient consideration for each. It is obvious that this more modern species of consideration was derived directly from the more ancient; that, in truth, it is the ancient consideration relaxed and reduced to a minimum. How and why this relaxation took place, it is not difficult to see. The ancient consideration was required for the creation of a debt, because "debt" was the name given to the contract which had been borrowed from the Roman law. A debt (*i. e.* by simple contract) could be created, therefore, only in the mode in which a *real* contract was made by the Romans; and the consideration in case of a debt corresponded to the *res* which gave the name to the Roman contract. The consideration, therefore, was of the very essence of a debt,—was, in fact, what created it. But when the action of *assumpsit* was introduced, and a new class of contracts came to be enforced, it was neither necessary nor possible to require the old consideration to make the new contracts binding. It was not necessary, because it was neither supposed nor claimed that the new contracts created or constituted debts; and it was not possible, because the very reason why a new action was required to enforce these contracts was that they had not a sufficient consideration to support an action of debt. Some relaxation, therefore, was indispensable from the beginning; and the process having begun, there was found to be no satisfactory stopping-place until the result already stated was reached. It may be urged that a more rational course would have been to apply the maxim, *Cessante ratione, cessat ipsa lex*, and to hold that the action of *assumpsit* required no consideration to support it. To this, however, it may be answered, that the courts could not change the law by their own authority; that the action of *assumpsit* was the creature of a statute, and was limited to cases which were analogous to cases

for which a legal remedy was already provided; that promises not under seal and without consideration were not analogous to any contracts which had ever been enforced, and that to have enforced such promises would have been to put parol contracts on the same footing with specialties.

47. But whatever may have been the merits of the question originally, it was long since conclusively settled in the manner stated above; and thus the action of *assumpsit* modified the old consideration instead of wholly superseding it; but so important were the modifications that the relationship of the new consideration to the old has been almost wholly lost sight of. Nay, the old consideration itself has been nearly lost sight of, though it is as necessary now as it ever was for the creation of a debt by simple contract. The reason is obvious. When the old consideration ceased to be necessary to the validity of any contract, it lost in a great measure its practical importance, except to lawyers; and when, by degrees, *assumpsit* had superseded debt upon simple contract, it ceased to attract the attention even of lawyers. The result is, that the term "consideration" has practically changed its meaning; having formerly meant the consideration necessary to create a debt, it now means the consideration necessary to support *assumpsit*. It is in this latter sense that it now constitutes an important branch of the law of contracts. . . .

AMES, HISTORY OF ASSUMPSIT, 2 Harv. Law Rev., 1–2, 14–16, 17–19.

The mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirement of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol." On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law." A third learned writer derives the action of *assumpsit* from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.

To the present writer it seems impossible to refer consideration to a single source. At the present day it is doubtless just and

expedient to resolve every consideration into a detriment to the promisee, incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the sixteenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these, detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special *assumpsit*, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. . . . . .

That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases. In one of them, in 1378, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in travelling to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a *subpœna* to compel the defendant to answer of his "disceit." The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. *Appilgrath* v. *Sergeantson* (1438) was also a bill for *restitutio in integrum*, savoring strongly of tort. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "grete deceit." The remaining case, thirty years later, does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by *subpœna*.

Both in equity and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. *Assumpsit* was in several instances distinguished from contract. By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*. Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of

compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrong-doer. But after the struggle of a century, it was finally decided that the personal representatives of a deceased person were as fully liable for his *assumpsits* as for his covenants. *Assumpsit*, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a disceit alleged." Chief Baron Gilbert explains the comprehensive scope of the general issue in *assumpsit* by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt." This allegation of deceit, in the familiar form: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc., which persisted to the present century, is an unmistakable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff today, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII.

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Indebitatus assumpsit, unlike special *assumpsit*, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent with Detinue. But as an express *assumpsit* was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, *i.e.*, *quid pro quo*, or benefit. This may explain the inveterate practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

Promises not being binding of themselves, but only because of the detriment or debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII, if not earlier, it became the practice, in pleading, to lay all *assumpsits* as made *in consideratione* of the detriment or debt. And these words became the peculiar mark of the technical action of *assumpsit*, as distinguished from other actions on the case against

surgeons or carpenters, bailees and warranting vendors, in which, as we have seen, it was still customary to allege an undertaking by the defendant.

It follows, from what has been written, that the theory that consideration is a "modification of *quid pro quo*," is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special *assumpsit* and debt, it is impossible to believe that the basis of the one action was evolved from that of the other.

Nor can that other theory be admitted by which consideration was borrowed from equity, as a modification of the Roman "*causa*." The word "consideration" was doubtless first used in equity; but without any technical significance before the sixteenth century. Consideration in its essence, however, whether in the form of detriment or debt, is a common-law growth. Uses arising upon a bargain or covenant were of too late introduction to have any influence upon the law of *assumpsit*. Two out of three judges questioned their validity in 1505, a year after *assumpsit* was definitely established. But we may go farther. Not only was the consideration of the common-law action of *assumpsit* not borrowed from equity, but, on the contrary, the consideration, which gave validity to parol uses by bargain and agreement, was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances. No action at law could ever be brought against a bargainor or covenantor. The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt, it was required also in the grant of a use. Equity might conceivably have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.

(b) *Express Trusts*

LANGDELL, BRIEF SURVEY OF EQUITY JURISDICTION, 2, 7, 11–13.

Obligations are either personal or real, according as the duty is imposed upon a person or a thing. An obligation may be imposed upon a person or a thing. An obligation may be imposed upon a person either by his own act, namely, by a contract, or by act of law.

An obligation may be imposed upon a thing either by the will of its owner, manifested by such act or acts as the particular system of law requires, or by act of law. It is in such obligations that those rights of property originate which are called rights in the property of another—*jura in re aliena*. Instances of real obligations will be found in servitudes or easements, in which the law regards the servient tenement as owing the service; also in the Roman *pignus* and *hypotheca*, in which the *res*, pignorated or hypothecated to secure the payment of a debt, was regarded as a surety for the debt. The *pignus* has been adopted into our law under the name of *pawn* or *pledge*. The *hypotheca* has been rejected by our common law, though it has been adopted by the admiralty law. A lien is another instance of a real obligation in our law, the very words "lien" and "obligation," having the same meaning and the same derivation. A familiar instance of a real obligation created by law will be found in the lien of a judgment or recognizance. . . .

Legal personal obligations may be created without limitation, either in respect to the persons between whom, or the purposes for which, they are created, provided the latter be not illegal. But it is otherwise with equitable obligations; for, as they must be founded originally upon legal rights, so they can be imposed originally only upon persons in whom legal rights are vested, and only in respect of such legal rights; *i. e.*, only for the purpose of imposing upon the obligors in favor of the obligees some duty in respect to such legal rights. But the original creation of equitable obligations is subject to still further limitations, for it is not all legal rights that can be the subjects of equitable obligations. Only those can be so which are alienable in their nature. Of absolute rights, therefore, none of those which are personal can ever be the subjects of equitable obligations, while nearly all rights which consist in ownership can be the subjects of such obligations. Relative rights can generally be the subjects of equitable obligations, but not always. For example, some rights arising from real obligations, are inseparably

annexed to the ownership of certain land, and, therefore, are not alienable by themselves. So, also, some rights arising from personal obligations are so purely personal to the obligee as to be obviously inalienable. It is only necessary to mention, as an extreme case, the right arising from a promise to marry.

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How, then, are purely equitable obligations created? For the most part, either by the acts of third persons or by equity alone. But how can one person impose an obligation upon another? By giving property to the latter on the terms of his assuming an obligation in respect to it. At law there are only two means by which the object of the donor could be at all accomplished, consistently with the entire ownership of the property passing to the donee, namely: first, by imposing a real obligation upon the property; secondly, by subjecting the title of the donee to a condition subsequent. The first of these the law does not permit; the second is entirely inadequate. Equity, however, can secure most of the objects of the doner, and yet avoid the mischiefs of real obligations, by imposing upon the donee (and upon all persons to whom the property shall afterwards come without value or with notice) a personal obligation with respect to the property; and accordingly this is what equity does. It is in this way that all trusts are created, and all equitable charges made (*i. e.*, equitable hypothecations or liens created) by testators in their wills. In this way, also, most trusts are created by acts *inter vivos*, except in those cases in which the trustee incurs a legal as well as an equitable obligation. In short, as property is the subject of every equitable obligation, so the owner of property is the only person whose act or acts can be the means of creating an obligation in respect to that property. Moreover, the owner of property can create an obligation in respect to it in only two ways: first, by incurring the obligation himself, in which case he commonly also incurs a legal obligation; secondly, by imposing the obligation upon some third person; and this he does in the way just explained.

But suppose a person, to whom property is given on the terms of his incurring an equitable obligation in respect to it, is unwilling to incur such obligation, shall it be imposed upon him against his will? Certainly not, if he employs the proper means for preventing it; but the only sure means of preventing it is by refusing to accept the property, *i. e.*, to become the owner of it; for no person can be compelled to become the owner of property even by way of gift.

If he once accept the property, the equitable obligation necessarily arises, and he can get rid of the latter only by procuring some one else to accept the property with the obligation; and even this he cannot do without the sanction of a court of equity.

An owner of property may, however, incur an equitable obligation in respect to it, founded upon his own act and intention, and yet make no contract, nor incur any legal obligation. For example, if an owner of property do an act with the intention of transferring the property, but which fails to accomplish its object because some other act is omitted to be done which the law makes necessary, equity will give effect to the intention by imposing an equitable obligation to do the further act which is necessary to effect the transfer, provided a valuable consideration was paid for the act already done, so that the transfer, when made, will be a transfer for value, and not a voluntary[1] transfer. So, if an owner of property, thinking that he has the power to hypothecate it merely by declaring his will to that effect, declare, for a valuable consideration, that such property shall be a security to a creditor for the payment of his debt, though he will not create a legal hypothecation, nor incur any legal obligation, yet he will create an equitable hypothecation or an equitable lien; *i. e.*, equity will give effect to the intention by creating an equitable obligation to hold the property as if it were legally bound for the payment of the debt. In both the cases just put, equity proceeds upon the principle that the act already done would be effective for the accomplishment of its object in the absence of any positive rule of law to the contrary; and in both cases equity gives effect to the intention without any violation of law; for, in the first case, equity compels a performance of every act which the law requires, while, in the second case, equity merely creates a personal obligation which violates no law, in lieu of a real obligation, which the law refuses to create.

MAITLAND, EQUITY, 44–49, 53–56, 115–120.

I should define a trust in some such way as the following:— When a person has rights which he is bound to exercise upon behalf of another or for the accomplishment of some particular purpose he is said to have those rights in trust for that other or for that purpose and he is called a trustee. . . .

1. The trustee is bound to use his rights in a certain way, bound to use them for the benefit of another, or for the accomplishment

[1] This is a technical legal term, meaning "for no equivalent."

of a certain purpose. One is not made a trustee by being bound *not* to use one's rights in some particular manner. On every owner of lands or goods there lies the duty of not using them in various ways. The law of torts largely consists of rules which limit the general rights of owners. I must not dig a quarry in my land so as to cause the subsidence of my neighbour's land. If I do this I commit a wrong and give my neighbour a cause of action; but of course I am not a trustee of my land for him.

2. A debtor is not a trustee for his creditor. I am heavily indebted. Certainly I ought not to give away my goods and thus prevent my creditors from obtaining payment of what is due to them. If I do so a court with bankruptcy jurisdiction may punish me. What is more, conveyances or assignments of property may be set aside as being frauds against creditors. For all this I am not a trustee for my creditors. No creditor can point to a particular thing or a particular mass of rights and say, "You were bound to use that or to retain that for me or to hand it over to me." The creditors, unless they be mortgagees, have merely rights *in personam*; if they be mortgagees they have also rights *in rem*; but in neither case is there any trust.

3. We must distinguish the trust from the bailment. This is not very easy to do, for in some of our classical text-books perplexing language is used about this matter. For example, Blackstone defines a bailment thus: "Bailment, from the French *bailler*, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee" (*Comm.* II, 451).

Here a bailment seems to be made a kind of trust. Now, of course, in one way it is easy enough to distinguish a bailment from those trusts enforced by equity, and only by equity, of which we are speaking. We say that the rights of a bailor against his bailee are legal, are common law rights, while those of a *cestui que trust* against his trustee are never common law rights. But then this seems to be a putting of the cart before the horse; we do not explain why certain rights are enforced at law, while other rights are left to equity.

Let us look at the matter a little more closely. On the one hand we will have a bailment — A lends B a quantity of books — A lets to B a quantity of books in return for a periodical payment — A deposits a lot of books with B for safe custody. In each of these cases B receives rights from A, and in each of these cases B is under

an obligation to A; he is bound with more or less rigor to keep the books safely and to return them to A. Still, we do not, I think, conceive that B is bound to use on A's behalf the rights that he, B, has in the books. Such rights as B has in them he has on his own behalf, and those rights he may enjoy as seems best to him. On the other hand, S is making a marriage settlement and the property that he is settling includes a library of books; he vests the whole ownership of these books in T and T′ who are to permit S to enjoy them during his life and then to permit his firstborn son to enjoy them and so forth. . . . Now here T and T′ are full owners of the chattels. S and the other *cestui que trusts* have no rights in the chattels, but T and T′ are bound to use their rights according to the words of the settlement, words which compel them to allow S and the other *cestui que trusts* to enjoy those things. . . . There are two tests which will bring out the distinction. The one is afforded by the law of sale, the other by the criminal law.

(*a*) A is the bailor, B is the bailee of goods; B sells the goods to X, the sale not being authorized by the terms of the bailment and not being made in market overt or within the Factor's Acts. X, though he purchases in good faith, and though he has no notice of A's rights, does not get a good title to the goods. A can recover them from him; if he converts them to his use he wrongs A. Why? Because he bought them from one who was not owner of them. Turn to the other case. T is holding goods as trustee of S's marriage settlement. In breach of trust, he sells them to X; X buys in good faith and has no notice of the trust. X gets a good title to the goods; T was the owner of the goods; he passed his rights to X; X became the owner of the goods and S has no right against X — for it is an elementary rule, to which I must often refer hereafter, that trust rights cannot be enforced against one who has acquired legal (*i.e.*, common law) ownership *bona fide*, for value, and without notice of the existence of those trust rights. Here you see one difference between the bailee and the trustee.

(*b*) Then look at the criminal law. Even according to our medieval law a bailee could be capable of the crime of larceny. If, before the act of taking, he had done some act which, as the phrase went, determined the bailment, if, for example, the carrier broke bulk and then took the goods — this was larceny. And now-a-days, as you know, by virtue of a statute, the bailee can be guilty of larceny though apart from the act of conversion he has done no act determining the bailment. But to the trustee of goods who

misappropriated them, the common law of crime had nothing whatever to say. How could a court of common law have punished the trustee? It said that he was the owner of the goods, and a man cannot steal what he both owns and possesses. Not until 1857 did it become a crime for the trustee to misappropriate goods that he held in trust — and even now the crime that he commits is not larceny and is not a felony. All this you may read at large in Stephen's *History of the Criminal Law*. I refer to it merely in order to show you that despite Blackstone's definition of a bailment there is a great and abiding distinction between a bailee of goods and a true trustee of goods. And the difference, I think, is this — the bailee though he has rights in the thing — "a special property" or "special ownership" they are sometimes called — has not the full ownership of the thing; "the general ownership" or "the general property" is in the bailor. On the other hand, the trustee is the owner, the full owner of the thing, while the *cestui que trust* has no rights in the thing. That statement that *cestui que trust* has no rights in the thing may surprise you, but I shall justify it hereafter. The specific mark of the trust is, I think, that the trustee has rights, which rights he is bound to exercise for the benefit of the *cestui que trust* or for the accomplishment of some definite purpose. . . .

Our next question must be, How is a trust created? And here we come upon a classification of trusts which turns upon the mode by which they are created. Trusts are created (1) by the act of a party, (2) by the operation of law. I do not think that these terms are unexceptionable, still they are well known and useful. A further classification has been made:

Trusts { By act of a party { Express / Implied
By act of the law { Resulting / Constructive

Now, I should say, that the normal means by which a person becomes bound by a trust is a declaration made by him by words or implied in his conduct to the effect that he intends to be so bound. As I have already hinted this morning, the creation of a trust may be a perfectly unilateral act — there may not be more than one party to it — and we may fail to find in it any element that could in the ordinary use of words be called trust or confidence. I declare

myself a trustee of this watch for my son who is in India. If afterwards I sell that watch, although my son has never heard of the benefit that I had intended for him, I commit a breach of trust and my son has an equitable cause of action against me.

But though this be so, the commonest origin of a trust is a transaction between two persons. This we may for a while treat as typical. Here S conveys land, or movable goods, or consols, or a debt, to T upon a trust, and T consents to execute that trust. We have here an agreement between S and T, and since that agreement is a binding one — since it can be enforced by that part of our law which is called equity, we well might say that there is a contract between S and T. Indeed I think it impossible so to define a contract that the definition shall not cover at least three quarters of all trusts that are created. For my own part, I think that we ought to confess that we cannot define either agreement or contract without including the great majority of trusts, and that the reasons why we still treat the law of trusts as something apart from the law of contract are reasons which can be given only by a historical statement. Trusts fell under the equitable jurisdiction of the Court of Chancery and for that very reason the Courts of Law did not enforce them. Just now and again they threatened to give an action for damages against the defaulting trustee — but they soon abandoned this attempt to invade a province which equity had made its own. Therefore, for a very long time to come, I think that we shall go on treating the law of trusts as something distinct from the law of contracts — we shall find the former in one set of books, the latter in another set. Only let us see that in the common case a trust originates in what we cannot but call an agreement. S transfers land or goods or debts to T upon a trust; T promises, expressly or by his conduct, that he will be bound. If you please you can analyze the transaction into a proposal and an acceptance — Will you hold this land, these goods, in trust for my wife and children? Yes, I will.

You will find it laid down as an elementary rule that no one can be compelled to undertake a trust. Until a man has accepted a trust he is not a trustee. You, without my knowledge, convey land unto and to the use of me and my heirs upon trust for X. When I hear of that conveyance I can renounce the rights and the duties that you have attempted to cast upon me. If I am prudent I shall very likely execute a deed saying that I renounce the estate; but now-a-days it is clear that even a freehold estate (there used to

be doubt about this) may be renounced by parol. I do not think that in strictness, any active renunciation can be expected of me any more than I can be compelled to answer a letter in which you propose to sell me a horse. If, when I hear of the trust I simply do nothing, then I am no trustee, I thereby disclaim the estate. . . . Upon principle, as it seems to me, the law cannot throw on a man the burden of either accepting or rejecting the trust; if he does absolutely nothing that can be construed as an acceptance of the trust, this should be enough. But in practice it would not be very safe to rely upon this doctrine, for one may very easily do something or say something that can be regarded as an acceptance of the trust. . . .

Now as regards the formalities necessary to the constitution of a trust, there is extremely little law — trusts have not been hedged about by formalities. I believe that I may state the matter thus: Subject to one section of the Statute of Frauds and to the Wills Act, a trust can be created without deed, without writing, without formality of any kind by mere word of mouth; and subject to certain established rules of construction, no particular words are necessary.

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We may well say therefore that a *cestui que trust* has rights which in many ways are treated as analogous to true proprietary rights, to *jura in rem*. But are they really such?

We must begin with this that the use or trust was originally regarded as an obligation, in point of fact a contract though not usually so called. If E enfeoffs T to his (E's) use the substance of the matter clearly seems to be this, that T has undertaken, has agreed, to hold the land to the use of E.

To my mind it is much easier to understand why the Chancellors of the fifteenth century should have enforced such a compact than why the courts of law should have refused a remedy. Why should they not have given an action of *assumpsit?* (See on this question, Pollock, *Land Laws*, Note E.) The action of *assumpsit* was just being developed when uses were becoming fashionable. It would, I think, be found that the Chancellors were beforehand in this matter and, by giving a far more perfect remedy than the common-law courts could give, made any remedy in those courts unnecessary. All that the *cestui que use* could have obtained from them would have been an action for damages; the Chancellor compelled the feoffee not only to answer any complaint on oath

but also to perform his duty specifically on pain of going to prison. Anyhow a *cestui que use* or *cestui que trust* never got an action at common law against his trustee; but all the same it seems utterly impossible for us to frame any definition of a contract which shall not include the acts by which ninety-nine out of every hundred trusts are created, unless we have recourse to the expedient of adding to our definition of contract a note to the effect that the creation of a trust is to be excluded. This is excellently explained by Sir Frederick Pollock. We are, as I think, obliged to say that though our definition of contract will include almost every act creating a trust, yet for historical reasons which still have an important influence on the whole scheme of our existing law, trusts are not brought within all, or even perhaps the larger part, of the great principles which form the Law of Contract, but have rules of their own. Thus, to give one example, though as I have just said ninety-nine out of a hundred trusts begin in a transaction which must fall within our definition of an agreement, the hundredth will not; for I can make myself a trustee for a person, and so create a trust, without his knowing anything about it, by a declaration that I hold lands or goods in trust for him. Certainly, as a matter of convenience, it seems desirable to keep the Law of Trust apart from the Law of Contract, though as a matter of principle it is necessary to see, as we shall see hereafter, that there are important analogies between the two.

However our present point must be that the Law of Trusts (formerly uses) begins with this, a person who has undertaken a trust is bound to fulfil it. We have no difficulty in finding a ground for this — the trustee, the feoffee to uses, is bound because he has bound himself. This is the original notion. The right of *cestui que trust* is the benefit of an obligation. This is how Coke understood the matter. "An use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral annexed in privity to the estate of the land, and to the person touching the land . . . *cestui que use* had neither *jus in re* nor *jus ad rem*, but only a confidence and trust." (Co. Lit. 272 b.)

But if this be so, why is it that the rights of *cestui que trust* come to look so very like real proprietary rights, so like ownership, so that we can habitually speak and think of him as the owner of lands and goods? Part of the answer has already been given. As regards (if I may be allowed the phrase) their internal character these equitable rights are treated as analogous to legal rights in

lands or goods — I mean as regards duration, transmission, alienation. But the whole answer has not yet been given. We are examining the external side of these rights, asking against whom they are good, and we shall find that even when examined from this point of view they are like, misleadingly like, *jura in rem*.

In this development we may trace several logical stages: —

(i) The first is reached when the *cestui que trust* has a remedy against the person who has undertaken to hold land or goods on trust for him.

(ii) A second step is easy. The use or trust can be enforced against those who come to the land or goods by inheritance or succession from the original trustee, against his heir, his executors or administrators, against the trustee's doweress. Such persons may be regarded as sustaining wholly or partially the *persona* of the original trustee and being bound by his obligations as regards the proprietary rights to which they have succeeded.

(iii) A third step is to enforce the trust against the trustee's creditors — *e.g.*, against the trustee's creditor who has taken the land by *elegit*. There seems to have been a good deal of difficulty about this step — more than we might have supposed — and it was not taken finally until after the Restoration in 1660. Just at the same time the Court of Chancery was beginning to insist that the *cestui que trust's* creditors could attack his equitable rights. However it became well established that these rights were good against the creditors of the trustee.

(iv) What shall we say of the trustee's donee, of one to whom the trustee has given the thing without valuable consideration? He has not entered into any contract with *cestui que trust* or into anything at all like a contract; he may be utterly ignorant of the trust. Nevertheless this step was taken, and as it seems at an early period. The right of *cestui que trust* was enforced against any person who came to the thing through or under the trustee as a volunteer — *i.e.*, without valuable consideration, even though he had no notice of the trust. We see the *cestui que trust's* right beginning to look "real."

(v) A fifth step was taken and this also at an early time. The trust was enforced even against one who purchased the thing from the trustee, if he at the time of the conveyance knew of the trust. What is the ground for this? The old books are clear about it, the ground is fraud or something akin to fraud. It is unconscientious — "against conscience" — to buy what you know to be

held on trust for another. The purchaser in such a case is, we may well say, liable *ex delicto vel quasi*. He has done what is wrong; has been guilty of fraud, or something very like fraud.

(vi) Having taken this step, another is inevitable. If we stop here, purchasers will take care not to know of the trust. To use a phrase used in the old reports, they will shut their eyes. The trust must be enforced against those who would have known of the trust had they behaved as prudent purchasers behave. Thus, to use the term which Holmes has made familiar, an objective standard is set up, a standard of diligence. It is not enough that you should be honest, it is required of you that you should also be diligent. To describe this standard will be my object in another lecture. Here it must be enough that it was and is a high standard —the conduct of a prudent purchaser according to the estimate of equity judges. If a purchaser failed to attain this standard, to make all such investigations of his vendor's title as a prudent purchaser would have made, he was treated as having notice, he was "affected with notice," of all equitable rights of which he would have had knowledge had he made such investigations: of such rights he had "implied notice," or "constructive notice." We arrive then at this result, equitable rights will hold good even against one who has come to the legal ownership by purchase for value, if when he obtained the legal ownership he had notice express or constructive of those rights.

But here a limit was reached. Against a person who acquires a legal right *bona fide*, for value, without notice express or constructive of the existence of equitable rights those rights are of no avail. . . .

How could it be otherwise? A purchaser in good faith has obtained a legal right. In a court of law that right is his: the law of the land gives it him. On what ground of equity are you going to take it from him? He has not himself undertaken any obligation, he has not succeeded by voluntary (gratuitous) title to any obligation, he has done no wrong, he has acted honestly and with diligence. Equity cannot touch him, because, to use the old phrase, his conscience is unaffected by the trust.

The result to which we have attained might then, as it would seem, be stated in one of two alternative ways.

(1) *Cestui que trust* has rights enforceable against any person who has undertaken the trust, against all who claim through or under him as volunteers (heirs, devisees, personal representatives, donees) against his creditors, and against those who acquire the thing with notice actual or constructive of the trust.

Or (2) *Cestui que trust* has rights enforceable against all save a *bona fide* purchaser ("purchaser" in this context always includes mortgagee) who for value has obtained a legal right in the thing without notice of the trust express or constructive.

Of these two statements the second form is now the more popular, but I should prefer the first — I should prefer an enumeration of the persons against whom the equitable rights are good to a general statement that they are good against all, followed by an exception of persons who obtain legal rights *bona fide*, for value and without notice. A statement in the former form is, I think, preferable because it puts us at what is historically the right point of view — the benefit of an obligation has been so treated that it has come to look rather like a true proprietary right — and it might still be rash to say positively that purchasers without notice are the only owners against whom the equitable rights are invalid.

2. OBLIGATIONS ARISING FROM OFFICE OR CALLING

WYMAN, PUBLIC SERVICE CORPORATIONS, I §§ 1, 331–334.

Sec. 1. Public callings and private business.— The difference between public callings and private business is a distinction in the law governing business relations which has always had and will always have most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business may always refuse to sell if they please. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports the medieval system of established monopolies called for the legal requirement of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade which gradually did away with the necessity for coercive law. Indeed in the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of the public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure

the public good; and it has been reluctantly admitted that State control is again necessary over such lines of industry as are affected with a public interest. Thus with varying importance, the distinction between the public callings and the private callings has been present in our law from the earliest times to the present day. The common law requiring public service from those who profess a public calling has been ready to deal with every public employment at the instant of its recognition as such, for the protection of the whole people so far as it was generally felt that such protection was necessary.

. . . . . .

Sec. 331. Nature of the public duty.— The fundamental fact in public employment is the public duty which results in all cases from public profession of a public calling. It is somewhat difficult to place this exceptional duty in our legal system. 'It is like the contractual obligation in that it is an affirmative duty to act for a certain person; but it is different in that it does not depend upon assent of the party charged. It is like the obligation in tort in that it is imposed by law; but it is not imposed upon anyone against his will as is the obligation in tort. In one sense the obligation to serve the public is voluntarily assumed; and therein the public duty to act differs from the typical duty not to commit a tort, which each person without his ever being consulted owes to all the world. And yet once this obligation is established by his undertaking, his duty extends to all within the profession, however unwilling he may be in a particular case to render service. Public duty is in this sense imposed by law upon those who put themselves into public service; and therein very plainly the situation differs from the typical contractual duty which one owes only in particular cases to the persons with whom he has voluntarily negotiated a previous agreement. If one may thus employ the two traditional phrases, the duty is absolute rather than relative. For it is a duty imposed by law regardless of dissent in particular instances, not one for which the actual assent of the person obliged is necessary in every case. And yet it must be obvious that in public obligation we have an intermediate case in many respects. It is like a status which one is under no obligation to enter, except by his own free will; but, once having committed himself to it, the duties pertaining to that status are devolved upon him by operation of law regardless of his own wishes. However, he is committed to it no further than the peculiar law governing the situation requires.

Sec. 332. Obligations of the subsequent relationship.— This argument may be carried still further; even after a relationship has been established between the proprietor and the patron by application and acceptance, it still remains generally true that the resulting obligations are imposed by law as the necessary consequence of the undertaking. There is no actual contract involved, although there is a consensual arrangement in the sense that the consent of the proprietor as well as that of the patron is needed to create it. In this view of the duty, it is difficult to place it in our law. It is not exactly absolute, because it does not exist unless it is assumed; but certainly it is not relative after it is once assumed. This situation is not without analogies in our law. If a common carrier is under special obligation because he assumes as such, so is a private bailee governed by the law appertaining to his position as such. If a public servant is bound to peculiar responsibilities by reason of his status, a private agent is similarly bound by special law. In all cases of this sort the action against the person who has not acted toward the person entitled to his regard in accordance with the obligation of his status is really *ex delicto* rather than *ex contractu*.

Sec. 333. The original obligation is *sui generis*.— The truth of the matter is that the obligation resting upon one who has undertaken the performance of a public duty is *sui generis*. It cannot be forced into the typical forms of action without artificiality, as experience has shown. When the wrong complained of is the refusal of the proprietor of the business to render the service requested, the applicant may indeed frame a proper action on the case setting forth the nature of the defendant's business and his profession of it, and showing how he himself is entitled to demand the service, having complied with all conditions precedent. The character of this action is well described by Chief Justice Biddle in the leading American case. "This action is brought against a railroad company that has become a common carrier, as is alleged, by holding itself before the public as such, and thus has undertaken the general public duty of carrying goods for all persons who may apply, and necessarily thereby has incurred the liability incident to a breach of such general public duty, to all persons injured thereby without any special contract in the given case. The case, therefore, must be governed by the general law regulating the remedy for a breach of a public duty."

Sec. 334. Nature of the obligation after acceptance.— When, however, the wrong complained of is some default of the proprietor

of the business in the performance of a service which is being rendered by virtue of his acceptance of the application of the patron, the situation is made difficult by the common practice of permitting the customer in such a case to make this breach the basis of either an action on the case for tort or an action in *assumpsit* apparently like that for breach of contract. Even in this case it is probable that the contract form dates back to that early *assumpsit* against those who undertake the performance of a public duty, which long antedates the action of *assumpsit* for the enforcement of a private bargain. In one of the leading English cases where the action was for default in service already begun, Chief Justice Dalles said:— "The action is on the case, against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to convey and carry their goods and passengers safely and securely, so that by their negligence or fault no injury happens. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."

3. OBLIGATIONS ARISING FROM FIDUCIARY RELATIONS

WOOD V. ROWCLIFFE, IN CHANCERY, 1847 (2 Phil. 382).

The Lord Chancellor said:— The cases which have been referred to, are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject-matter be stock, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power. In this case there is great reason to believe that Elizabeth Wright never had any right to the goods except as the plaintiff's agent, for she has disclaimed all interest in them by her answer, and there is nothing to shew how she had acquired any property in them. But, says Rowcliffe, I purchased under circumstances which give me a legal right to the goods. If that be so, the equity of the plaintiff will be intercepted by a prior legal right. In such a case this Court begins by putting the matter into a course of investigation to ascertain that legal right. That is what the Vice-Chancellor has done. And in that respect I see no ground for impeaching the decree.

STORY, EQUITY JURISPRUDENCE, I, § 308.

308. It is undoubtedly true, as has been said, that it is not upon the feelings which a delicate and honorable man must experience, nor upon any notion of discretion to prevent a voluntary gift or other act of a man whereby he strips himself of his property, that Courts of Equity have deemed themselves at liberty to interpose in cases of this sort. They do not sit, or affect to sit, in judgment upon cases as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. If confidence is reposed, it must be faithfully acted upon, and preserved from any intermixture of imposition. If influence is acquired, it must be kept free from the taint of selfish interests, and cunning and over-reaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good. Courts of Equity will not therefore arrest or set aside an act or contract merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels the one to make a full discovery to the other or to abstain from all selfish projects. But when such a relation does exist, Courts of Equity, acting upon this superinduced ground in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance; for it is founded in a breach of confidence. The general principle which governs in all cases of this sort is, that if a confidence is reposed and that confidence is abused, Courts of Equity will grant relief.

BISPHAM, PRINCIPLES OF EQUITY, § 237.

The same rule as that which exists between trustee and *cestui que trust* applies to all persons who occupy a fiduciary, or *quasi*-fiduciary relation — such as executors or administrators, directors of a corporation or a society, agents, medical or religious advisers, husband and wife, a man and woman engaged to be married — in fine, to all those who occupy positions of trust and confidence towards others. And the rule may be applied to instances where, as in the case of dealings between a surviving partner of a firm and the personal representative of the deceased partner, although there may not be any confidential relation which gives rise to the existence and exercise of undue influence, yet there may nevertheless exist (as was aptly said in a case in Virginia) "that dangerous *inequality*

of *knowledge* with respect to the subject-matter" which will result in the transaction being set aside if it does not turn out, after jealous scrutiny, to have been reasonable, fair and just.

4. OBLIGATIONS ARISING FROM UNJUST ENRICHMENT

MOSES v. MACFERLAN, KING'S BENCH, 1760 (2 Burr. 1005).

Action of *Indebitatus Assumpsit* for Money had and received to the Plaintiff's Use.

Lord Mansfield: This kind of equitable action to recover back money which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law,— as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion, That the plaintiff might elect to waive any demand upon the foot of the indemnity, for the costs he had been put to; and bring this action to recover the £6 which the defendant got and kept from him iniquitously.

MAITLAND, EQUITY, 82–85.

2. We turn now to Constructive trusts. Under this head Mr. Lewin treats of but one grand rule. It is this: that wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as a trustee, he becomes a trustee of the advantage so gained. The common

illustration of this is the renewal by a trustee of a lease that he holds on trust. A leaseholder, in the leading case *Keech* v. *Sandford*, White and Tudor, Vol. II. 693 (7th edn.), bequeathed a leasehold to a trustee for an infant. The lease was running out. The trustee, doing his duty, asked that it might be renewed; this application was refused; the landlord did not want an infant tenant. The trustee then obtained a new lease in his own name. It was held that this new lease must be held upon trust for the infant. Lord King said, "I very well see that if a trustee on the refusal to renew might have a lease to himself, few trust estates would be renewed to a *cestui que use*. This may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued and not in the least relaxed." You see how far the doctrine goes. The landlord was under no duty to renew this lease and neither the trustee nor his *cestui que trust* had any right to demand its renewal — but an old tenant has, if I may so speak, a sort of goodwill with his landlord. If a trustee has this advantage, even though the trust does not bind him to use it, still if he does use it he must use it for his *cestui que trust* and not for himself. But though this is a good illustration of the rule, you must not suppose that it relates only to the renewal of leaseholds — far from it, if by reason of his position that trustee acquires any advantage of a valuable kind, he must hold it upon trust, he is constructively a trustee of it.

The rule includes persons who are not trustees properly so called, but all those who stand in what is called a fiduciary position. My land agent, for instance, is not a trustee for me, for he holds no rights, no property, upon trust for me; but if he takes advantage of his position as my agent to get some benefit from a third person, then he is a trustee of that benefit for me. I am not here speaking of cases of dishonesty which may come within the cognizance even of a court of law and give rise to an action of fraud — but it is a general principle of equity that if an agent acquire any pecuniary advantage to himself from third parties by means of his fiduciary character, he is accountable to his employer as a trustee for the profit that he has made. . . .

But the doctrine of constructive trusts is really a very wide one. It constantly operates in cases which we are apt to think of as being otherwise explained. Put this case — T holds land in fee simple upon trust for S in fee simple; T in breach of trust sells and conveys the land to X; X at the time of the sale knew of the trust.

Now of course we hold that S's rights as *cestui que trust* have not been destroyed by this sale and conveyance — they are valid against X. But why? You may perhaps say because S was in equity the owner, tenant in fee simple, of the land. That is one way of putting it, but as we shall see hereafter a somewhat dangerous way, for it may suggest that S's equitable rights are rights *in rem*, rights which cannot possibly be destroyed by any dealing that takes place between T and other persons. The more correct and the safer way of stating the matter is that X, having bought and obtained a conveyance of the subject-matter of the trust, knowing that the trust exists, is made a trustee for S. The result would have been the same if X, though he did not actually know of the trust for S, ought, in the opinion of a court of equity, to have known about it; in this case also X, though he obtains the legal estate by conveyance from T, becomes a trustee for S. . . . In the cases that I have just put, X does not consent to become a trustee for S; on the contrary his hope has been that he will be allowed to enjoy as beneficial owner the land that he has purchased from T. If then he is made a trustee this is not because he has agreed or consented to become one, but the result is produced by some rule of equity which, will he, nill he, makes him a trustee.

The rules of equity to which I refer might, I think, be stated thus: Any one who comes to the legal estate or legal ownership as the representative (heir, devisee, executor or administrator) of a trustee, or who comes to it by virtue of a voluntary gift made by a trustee, or who comes to it with notice of the trust, or who comes to it in such circumstances that he ought to have had notice of the trust, is a trustee. It is not usual in such a case to call the trust a constructive one, still I want you to see that the man in question gets bound by a trust without desiring to become a trustee and even although he has every wish to escape such an obligation. Put a simple case: T is trustee in fee simple for A in fee simple; T dies; formerly (as I shall explain next time) the legal estate would have descended to T's heirs or passed under his will to a devisee, now-a-days it will pass to T's executor or administrator, his personal representative. Now the personal representative, Q let us call him, is undoubtedly bound by the trust. Why so? Because he has consented to accept it. No, it is very possible that when he proved T's will or took out letters of administration to T's estate he knew absolutely nothing of the trust. Still he is bound by it. Why is he bound? Because he comes to it as the trustee's representative.

Now it is usual, and I think, very proper, to deal with the rules about this matter in a context other than the present. They come in answer to the question "What are the nature of the *cestui que trust's* rights — against what persons or classes of persons can these equitable rights be enforced?" Still, I want you to see that really they might also be treated from our present point of view. If you are going to enforce the rights of a *cestui que trust* against any person, X, you must be prepared to show that in one way or another X has become a trustee for that *cestui que trust.* That is why you cannot enforce the trust against the *bona fide* purchaser for value who has no notice, express or implied, of the trust, and who obtains the legal estate.

5. ASSIGNMENT

BLACKSTONE, COMMENTARIES, II, 442.

First, then it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting parties of sufficient ability to make a contract; as where A contracts with B to pay him 100 *l.* and thereby transfers a property in such sum to B. Which property is, however, not in possession, but in action merely; and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law; for no *chose* in action could be assigned or granted over, because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded: though, in compliance with the ancient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee. But the king is an exception to this general rule, for he might always either grant or receive a *chose* in action by assignment: and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action as much as the law will that of a *chose* in possession.

BLACKSTONE, COMMENTARIES, II, 468.

In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by endorsement, or writing his name *in dorso*, or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the endorsee; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A or *bearer*, is negotiable by any bearer of it.

NEGOTIABLE INSTRUMENTS LAW, §§ 51, 52.

Sec. 51. The holder of a negotiable instrument may sue thereon in his own name; and payment to him in due course discharges the instrument. . . .

Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:—

1. That it is complete and regular upon its face;
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
3. That he took it in good faith and for value;
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

NEW YORK CODE OF CIVIL PROCEDURE (1848) §§ 111, 112.

Sec. 111. Every action must be prosecuted in the name of the real party in interest. . . .

Sec. 112. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set off or other defense existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

SUPREME COURT OF JUDICATURE ACT (1873), § 26, par. 6.

Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose* in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim

such debt or *chose* in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose* in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor. . . .

6. EXTINCTION OF OBLIGATIONS

HOLLAND, JURISPRUDENCE, Chap. XII.

We have already had occasion to mention incidentally some of the modes in which the obligations resulting from particular contracts are dissolved. It will, however, be necessary to consider, from a more general point of view, the circumstances which terminate rights "*in personam.*" They may, perhaps, be classified under the following heads: i, Performance; ii, Events excusing performance; iii, Substitutes for performance; iv, Release of performance; v, Non-performance.

i. Performance of the acts to which the person of incidence is obliged is the natural and proper mode by which he becomes loosed from the obligation of performing them.

. . . . . .

ii. Events excusing performance.

1. As a general rule, at any rate in English law, "subsequent impossibility" is no excuse for non-performance; but to this there are several exceptions:

(*a*) When the act due is intimately dependent on the individuality of either party, the right, or liability, to its performance must necessarily be extinguished by his death. It would be obviously absurd to make the executors of the Admirable Crichton responsible for his non-performance of a contract to marry, or those of Raphael for his inability to return to life and finish the "Transfiguration." Serious illness may have a similar effect.

(*b*) When the performance has reference to a specific thing, its destruction, without fault of the parties, puts an end to the right. So when the proprietors of a place of public entertainment had agreed to let it on a certain day, before which it was burnt down, they were held to be free from their engagement.

(*c*) A change in the law, or the outbreak of war between the countries of the contracting parties, may operate to make performance a "legal impossibility."

. . . . . .

3. "*Confusio*," or "merger," *i.e.*, the union in one person of the characters of debtor and creditor, is sometimes held to extinguish, sometimes only to suspend, the operation of the right.

4. Bankruptcy has already been mentioned more than once as one of the events which give rise to a universal succession. An order of discharge has the effect of freeing the bankrupt, either wholly or partially, according to the special provisions of the law under which he lives, from the claims to which he was previously liable.

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iii. Among substitutes for performance, the following are the more important.

. . . . . .

2. "Compromise," "*transactio*," which may be analyzed into a part payment, coupled with a promise not to claim the residue, can only operate as a discharge of the whole debt when the subsidiary promise is made in such a form, or under such circumstances that it might equally well have been a good discharge without any part payment. So in an old English case it was resolved "that payment of a lesser sum on the day, in satisfaction of a greater, cannot be a satisfaction to the plaintiff for a greater sum. When the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff."

3. It was long debated but finally admitted by the Roman lawyers that a "*datio in solutum*," or giving and acceptance of something other than the thing due, and in place of it, discharges the obligation. So in English law it is laid down that if a debtor pays to his creditor "a horse, or a cup of silver, or any such other thing, in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or the other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction."

4. "Set-off," "*compensatio*," defined by Modestinus as "*debiti et crediti inter se contributio*," has been sometimes regarded as rateably extinguishing a claim "*ipso jure*," sometimes only as

foundation for a plea, to which a Court may give regard in awarding judgment if the claim be sued upon. . . . The applicability of set-off has always been limited to debts of a readily calculable kind, and between the parties in the same rights. The doctrine was unknown to the English common law, upon which it was grafted for the first time by 2 Geo. II. c. 22.

5. The substitution of a new obligation for the old one by mutual consent is a species of that mode of discharging an obligation known to the Romans as "*novatio*."

iv. The mere agreement of the parties to a discharge of the liability is not always sufficient. The principle of Roman law was that every contract should be dissolved in the same manner in which it had been made. . . .

English law requires that a contract made under seal should be discharged in like manner. The effect of a mere agreement to discharge a consensual contract depends upon the doctrine of "consideration." If such a contract be still executory, the mutual release from its liabilities is a good consideration to each party for surrendering his rights under it. If it has been executed on one side it can be discharged only by an agreement founded on some new consideration, or by a deed, which is sometimes said to "import a consideration." The rule does not, however, apply to a discharge of promissory notes or bills of exchange, which doubtless owe their immunity from it to deriving their origin from the "law merchant."

v. Non-performance by one party to a contract often puts an end to the rights which he enjoys under it against the other party. And some acts short of non-performance may have the same effect. Thus if one party by his own act disables himself from performance, or announces that he has no intention of performing, the other side is in many cases entitled to treat what has occurred as a "breach of contract by anticipation," and the contract as being therefore no longer binding.

CHAPTER XII

PROPERTY [1]

1. NATURE OF PROPERTY AND POSSESSION

MARKBY, ELEMENTS OF LAW, §§ 307–319.

307. If we consider any material object, such as a field, a piece of furniture, a sum of money, or a sack of wheat, we shall see that various rights exist with respect to it. There is the right to walk about the field, to till it, to allow others to till it, and so forth; there is the right to use the piece of furniture, to repair it, to break it up, to sell it; there is the right to spend the money, to hoard it, to give it away; there is the right to grind the wheat, to make it into bread, to sow it for next year's crop, and so forth.

308. All these rights, which I have spoken of, are rights over the thing available against the world at large: *jura in re* and *in rem*.

309. If all the rights over a thing were centred in one person, that person would be the owner of the thing: and ownership would express the condition of such a person in regard to that thing. But the innumerable rights over a thing thus centred in the owner are not conceived as separately existing. The owner of land has not one right to walk upon it, and another to till it; the owner of a piece of furniture has not one right to repair it, and another right to sell it: all the various rights which an owner has over a thing are conceived as merged in one general right of ownership.

310. A person in whom all the rights over a thing were centred, to the exclusion of every one else, would be called the absolute and exclusive owner. This means that no one has any right over the thing except himself. It does not mean that he may exercise his ownership in accordance with his uncontrolled fancy. In the exercise of all legal rights, whether of ownership or of any other kind,

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[1] Salmond, Jurisprudence, §§ 152–163; Holland, Jurisprudence, Chap. XI, Subdiv. V; Markby, Elements of Law, Chaps. VIII–XIII; Pollock, First Book of Jurisprudence, Pt. I, Chap. VII; Digby, History of the Law of Real Property; Maine, Ancient Law, Chap. VIII; Kirchwey, Readings on the Law of Real Property.

each of us is under a certain control arising out of the relation in which we stand to the ruling power or to other members of the society to which we belong. I cannot exercise my rights in such a way as to infringe the law or the rights of others. To take an example: I am the absolute and exclusive owner of a large quantity of charcoal, sulphur and saltpetre. I am still the absolute owner, although the law forbids me to mix them together and keep them in my house. No one by reason of that restriction has a *jus in re* over them. Nor is my ownership affected. The restriction is on my liberty of action only.

311. But if I have pledged the saltpetre as security for a loan, then the pledgee has a *jus in re* over it; and my right to dispose of it is restricted, not by a mere restriction on my liberty of action, but because one or more of the rights of ownership have been detached and given to another.

312. So if I grant a right of way to a neighbor across my land, or if my neighbor has a right to graze his cattle there, he has a *jus in re* over my land, and certain rights have been detached from my ownership and transferred to him.

313. Absolute and exclusive ownership is rare: and yet I do not think it is possible to explain what is meant by ownership except by starting with this abstract conception of it. It is to this that we always revert when we are trying to form a conception of ownership.

314. Ownership, as I have said, is conceived as a single right, and not as an aggregate of rights. To use a homely illustration, it is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops. Yet, as we may take a drop or several drops from the bucket, so we may detach a right or several rights from ownership.

315. The distribution of rights detached from ownership which we actually find in use is very extensive. Thus, it would be no strange thing to find a piece of land, and that A had a right to till it, B a right to walk across it, C a right to draw water from a spring in it, D a right to turn his cattle on it to graze, E a right to take tithe on it, F a right to hold it as security for a debt, and yet possibly no one of these persons would be considered as the owner.

316. In such a case as this the owner would be stripped nearly bare of his rights, and it may seem, at first sight, purely arbitrary to continue to call such a person the owner. But this is not so. Though his ownership is greatly reduced, he is still in essentially a

different position from that of any other person. So long as the rights I have mentioned are in the hands of any other person, they have a separate existence, but as soon as they get back into the hands of the person from whom they are derived, as soon as they are "at home" as it were, they lose their separate existence, and merge in the general right of ownership. They may be again detached, but by the detachment a new right is created.

317. However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of this residuary right whom we always consider as the owner. An owner might, therefore, be described as the person in whom the rights over a thing do not exist separately, but are merged in one general right.

318. Or an owner might be described as the person whose rights over a thing are only limited by the rights which have been detached from it.

319. This residuary right, even in its slenderest form, is of great legal importance. It enables the holder of it to assume a position of great advantage in all legal disputes. All (he can say) belongs to me which cannot be shown to belong to any one else. Every one who intermeddles is an intruder, unless he can establish his right to do so. Everybody else must take just what he is entitled to and no more. The presumption is always in favour of the owner.

SALMOND, JURISPRUDENCE, § 106.

"Possession," says Ihering, "is the objective realisation of ownership." It is in *fact* what ownership is in *right*. Possession is the *de facto* exercise of a claim; ownership is the *de jure* recognition of one.[1] A thing is owned by me when my claim to it is maintained by the will of the state as expressed in the law; it is possessed by me, when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts. It is well to have both forms of security if possible; and indeed they normally co-exist. But where there is no law, or where the law is against a man, he must content himself with the precarious security of the facts. Even when the law is in one's favour, it is well to have the facts on one's side also. *Beati possidentes.* Possession, therefore, is the *de facto* counterpart

[1] Holmes, Common Law, Lect. VI; Salmond, Jurisprudence, §§ 93–107; Pollock & Wright, Possession (Introduction).

of ownership. It is the external form in which rightful claims normally manifest themselves. The separation of these two things is an exceptional incident, due to accident, wrong, or the special nature of the claims in question. Possession without ownership is the body of fact, uninformed by the spirit of right which usually accompanies it. Ownership without possession is right, unaccompanied by that environment of fact in which it normally realises itself. The two things tend mutually to coincidence. Ownership strives to realise itself in possession, and possession endeavors to justify itself as ownership. The law of prescription determines the process by which, through the influence of time, possession without title ripens into ownership, and ownership without possession withers away and dies.

Speaking generally, ownership and possession have the same subject-matter. Whatever may be owned may be possessed, and whatever may be possessed may be owned. This statement, however, is subject to important qualifications. There are claims which may be realised and exercised in fact without receiving any recognition or protection from the law, there being no right vested either in the claimant or in any one else. In such cases there is possession without ownership. For example, men might possess copyrights, trademarks, and other forms of monopoly, even though the law refused to defend these interests as legal rights. Claims to them might be realised *de facto*, and attain some measure of security and value from the facts, without any possibility of support from the law.

Conversely, there are many rights which can be owned, but which are not capable of being possessed. They are those which may be termed *transitory*. Rights which do not admit of continuing exercise do not admit of possession either. They cannot be exercised without being thereby wholly fulfilled and destroyed; therefore they cannot be possessed. A creditor, for example, does not possess the debt that is due to him; for this is a transitory right which in its very nature cannot survive its exercise. But a man may possess an easement over land, because its exercise and its continued existence are consistent with each other. It is for this reason that obligations generally (that is to say, rights *in personam* as opposed to rights *in rem*) do not admit of possession. It is to be remembered, however, that *repeated* exercise is equivalent in this respect to *continuing* exercise. I may possess a right of way through repeated acts of use, just as I may possess a right of light or support through

continuous enjoyment. Therefore, even obligations admit of possession, provided that they are of such a nature as to involve a series of repeated acts of performance. We may say that a landlord is in possession of his rents, an annuitant of his annuity, a bondholder of his interest, or a master of the services of his servant.

2. THINGS INCAPABLE OF OWNERSHIP

BLACKSTONE, COMMENTARIES, II, 14–15.

But, after all, there are some few things, which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such also are the generality of those animals which are said to be *ferae naturae*, or of a wild and untamable disposition; which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

Again: there are other things in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands; such also are wrecks, estrays, and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state; or else in his representatives appointed and authorized by him. . . .

3. KINDS OF PROPERTY[1]

BLACKSTONE, COMMENTARIES, II, 15–19, 20–21, 384–387.

The objects of dominion or property are *things*, as contradistinguished from *persons:* and things are by the law of England distributed into two kinds; things *real* and things *personal.* Things *real* are such as are permanent, fixed, and immovable, which cannot be carried out of their place; as lands and tenements: things *personal* are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.

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First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large. *Tenement* is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet, in its original, proper, and legal sense, it signifies everything that may be *holden*, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind. Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like; and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But an *hereditament*, says Sir Edward Coke, is by much the largest and most comprehensive expression: for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus an heirloom, or implement of furniture which by custom descends to the heir together with a house, is neither land, nor tenement, but a mere movable: yet being inheritable, is comprised under the general word hereditament; and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

Hereditaments then, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as

[1] Compare the archaic classification in Roman law, Sohm, Institutes of Roman Law (Ledlie's transl.), 2 ed. § 59, III.

affect the senses; such as may be seen and handled by the body: incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke, comprehendeth, in its legal signification, any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings: for they consist, said he, of two things; *land*, which is the foundation, and *structure* thereupon; so that if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of water only; either by calculating its capacity, as, for so many cubical yards; or by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*. For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary, property therein: wherefore, if a body of water runs out of my pond into another man's I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immovable: and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad caelum*, is the maxim of the law; upwards, therefore, no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant

of which, nothing passes but a right of fishing: but the capital distinction is this, that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum;* every thing terrestrial will pass.

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An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they, being merely a contingent springing right, collateral to or issuing out of lands, can never be the object of sense: that casual share of the annual increase is not, till severed, capable of being shown to the eye, nor of being delivered into bodily possession.

Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

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Under the name of things *personal* are included all sorts of things *movable*, which may attend a man's person wherever he goes: and therefore being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a

perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the law, as things that are in their nature more permanent and *immovable*, as land and houses, and the profits issuing thereout. These, being constantly within the reach and under the protection of the law, were the principal favorites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded as only a transient commodity. The amount of it indeed was comparatively very trifling, during the scarcity of money and the ignorance of luxurious refinement which prevailed in the feodal ages.[1] Hence it was, that a tax of the *fifteenth*, *tenth*, or sometimes a much larger proportion, of all the movables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common law, of *all* a man's goods and chattels, for misbehaviors and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law books, which are founded upon the feodal provisions, do not therefore often condescend to regulate this species of property. There is not a chapter in Britton or the Mirror, that can fairly be referred to this head; and the little that is to be found in Glanvill, Bracton, and Fleta seems principally borrowed from the civilians. But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity, and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical

[1] "A Cistercian abbot of the thirteenth century, who counted his sheep by the thousand, would have been surprised to hear that he had few chattels of any value." "Time was when oxen served as money and rules native in that time will easily live on into later ages. The *pecunia* of Domesday Book is not money but cattle. When cattle serve as money, one ox must be regarded for the purposes of the law exactly as good as another ox. . . . It was by slow degrees that beasts lost their 'pecuniary character'." Pollock and Maitland, History of English Law, II, 147, 150.

mode of considering the one than the other; frequently drawn from the rules which they found already established by the Roman law, wherever those rules appeared to be well grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to ancient usages, and a certain feodal tincture, which is still to be found in some branches of personal property.

But things personal, by our law, do not only include things *movable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which Sir Edward Coke says is a French word signifying goods. The appellation is in truth derived from the technical Latin word *catalla;* which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all movables in general. In the *grand coustumier* of Normandy a *chattel* is described as a mere movable, but at the same time it is set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more extended, negative sense, that our law adopts it: the idea of goods, or movables only, being not sufficiently comprehensive to take in everything that the law considers as a chattel interest. For since, as the commentator on the *coustumier* observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

Chattels therefore are distributed by the law into two kinds; chattels *real*, and chattels *personal*.

1. Chattels *real*, saith Sir Edward Coke, are such as concern, or savor of, the realty; as terms for years of land, wardships in chivalry, (while the military tenures subsisted,) the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out of, or annexed to, real estates: of which they have one quality, viz., immobility, which denominates them *real;* but want the other, viz., a sufficient, legal, indeterminate duration; and this want it is that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate

of freehold, a lease for another's life: their tenants were considered upon feodal principles as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII. A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by corporal investiture and livery of seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act of voluntary transfer, or of forfeiture; or else by the happening of some future contingency, as in estates *pur auter vie*, and the determinable freehold mentioned in a former chapter. And even these, being of an uncertain duration, may by possibility last for the owner's life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life-estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianship in chivalry expired of course the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality: that its duration is limited to a time certain, beyond which it cannot subsist.

2. Chattels *personal* are, properly and strictly speaking, things *movable;* which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion and transferred from place to place.[1]

4. TENURE

BLACKSTONE, COMMENTARIES, II, 59–60.

Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and *holden*

[1] See Pollock and Maitland, History of English Law, II, Chap. 4, § 7.

of, some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*. Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and, thus, partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord paramount; A. was both tenant and lord, or was a mesne lord; and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land. In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke, in the law of England we have not properly *allodium;* which, we have seen, is the name by which the feudists abroad distinguish such estates of the subject as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feodal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burthensome services than inferior tenures did.

STATUTE QUIA EMPTORES, 18 Edward I, 1290.

C. i. Forasmuch as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto

those lords and other great men, and moreover in this case manifest disheritance: our lord the king in his parliament at Westminster after Easter, the eighteenth year of his reign, that is to wit in the quinzine of Saint John Baptist, at the instance of the great men of the realm, granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them, so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

C. ii. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain, to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold; and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord according to the quantity of the land or tenement sold for the parcel of the service so due.

C. iii. And it is to be understood that by the said sales or purchases of lands or tenements, or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy ne craft, contrary to the form of the statute made thereupon of late. And it is to wit that this statute extendeth but only to lands holden in fee simple, and that it extendeth to the time coming. And it shall begin to take effect at the Feast of Saint Andrew the Apostle next coming.

BUTLER, NOTE TO COKE ON LITTLETON, 266*b*.

Seisin is a technical term denoting the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. It is a word common as well to the French as to the English law. It is either in deed, which is, when the person has the actual seisin or possession; or in law, when after a descent the person on whom the lands descend has not actually entered and the possession continues vacant, not being usurped by another. When lands of inheritance are carved into different estates, the tenant of the freehold in possession, and the persons in remainder or reversion, are equally *in* the seisin of the fee. But in opposition to what may be termed the expectant nature of the seisin of those in remainder or reversion, the tenant in possession is said to have the actual seisin of the

lands. The fee is entrusted to him. By any act which amounts to a disaffirmance by him of the title of those in the reversion, he forfeits his estate, and any act of a stranger which disturbs his estate is a disturbance of the whole fee. *Disseisin* seems to imply the turning the tenant out of his fee, and usurping his place and relation.

BLACKSTONE, COMMENTARIES, II, 62–63, 78–79.

The first, most universal, and esteemed the most honorable species of tenure, was that by knight-service, called in Latin *servitium militare;* and in law-French, *chivalry*, or *service de chivaler*, answering to the *fief d'haubert* of the Normans, which name is expressly given it by the Mirrour. This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feodal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare;* the measure of which in 3 Edw. I. was estimated at twelve plough lands, and its value (though it varied with the times) in the reigns of Edward I. and Edward II. was stated at £20 *per annum*. And he who held this proportion of land (or a whole fee) by knight-service, was bound to attend his lord to the wars for forty days in every year, if called upon; which attendance was his *reditus* or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion. And there is reason to apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feodal system.

This tenure of knight-service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi;* was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz., aids, relief, primer seisin, wardship, marriage, fines for alienation and escheat. . . .

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The military tenure, or that by knight-service, consisted of what were reputed the most free and honorable services, but which in

their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free socage*, consisted also of free and honorable services but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight-service, where the render was precarious and uncertain. Thus Bracton: if a man holds by rent in money, without any escuage or serjeantry, "*id tenementum dici potest socagium*": but if you add thereto any royal service, or escuage, to any the smallest amount, "*illud dici poterit feodum militare.*" So too the author of Fleta: "*ex donationibus, servitia militaria vel magnae serjantiae non continentibus, oritur nobis quoddam nomen generale, quod est socagium.*" Littleton also defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight-service. And therefore afterwards he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch, a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage: as to hold by fealty and 20s. rent; or, by homage, fealty, and 20s. rent; or, by homage and fealty without rent; or by fealty and certain corporal service, as ploughing the lord's land for three days; or, by fealty only without any other service: for all these are tenures in socage.

STATUTE 12 CAR. II, c. 24, 1660.

Whereas it hath been found by former experience that the Court of Wards and Liveries and tenures by knight-service either of the king or others, or by knight-service *in capite*, or socage *in capite* of the king, and the consequents upon the same, have been much more burthensome, grievous and prejudicial to the kingdom than they have been beneficial to the king. And whereas since the intermission of the said court, which hath been from the four and twentieth day of February, which was in the year of our Lord one thousand six hundred forty and five, many persons have by will and otherwise made disposal of their lands held by knight-service, whereupon

divers questions might possibly arise unless some seasonable remedy be taken to prevent the same; Be it therefore enacted by the King our Sovereign Lord with the assent of the Lords and Commons in Parliament assembled, and by the authority of the same, and it is hereby enacted, That the Court of Wards and Liveries, and all wardships, liveries, primer seisins and *ousterlemains*, values and forfeitures of marriages, by reason of any tenure of the king's majesty, or of any other by knight-service, and all mean rates, and all other gifts, grants, and charges, incident or arising for or by reason of wardships, liveries, primer seisins, or *ousterlemains* be taken away and discharged, and are hereby enacted to be taken away and discharged, from the said twenty-fourth day of February, one thousand six hundred forty and five; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding. And that all fines for alienations, seizures, and pardons for alienations, tenure by homage, and all charges incident or arising for or by reason of wardship, livery, primer seisin, or *ousterlemain*, or tenure by knight-service, escuage, and also *aide pur file marrier, et pur faire fitz chivalier*, and all other charges incident thereunto be likewise taken away and discharged from the said twenty-fourth day of February, one thousand six hundred forty and five; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding. And that all tenures by knight-service of the king, or of any other person, and by knight-service *in capite*, and by socage *in capite* of the king, and the fruits and consequents thereof, happened or which shall or may hereafter happen or arise thereupon or thereby, be taken away and discharged; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding: and all tenures of any honors, manors, lands, tenements, or hereditaments, of any estate of inheritance at the common law, held either of the king or of any other person or persons, bodies politic or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes, from the said twenty-fourth day of February, one thousand six hundred forty and five, and shall be so construed, adjudged and deemed to be from the said twenty-fourth day of February, one thousand six hundred forty and five, and forever hereafter, turned into free and common socage; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

2. And that the same shall forever hereafter stand and be discharged of all tenure by homage, escuage, voyages royal, and charges

for the same, wardships incident to tenure by knight's service, and values and forfeitures of marriage, and all other charges incident to tenure by knight-service, and of and from *aide pur file marrier*, and *aide pur faire fitz chivalier;* any law, statute, usage or custom to the contrary in any wise notwithstanding. And that all conveyances and devises of any manors, lands, tenements, and hereditaments, made since the said twenty-fourth day of February, shall be expounded to be of such effect as if the same manors, lands, tenements, and hereditaments had been then held and continued to be holden in free and common socage only; any law, statute, custom, or usage to the contrary hereof in any wise notwithstanding.

. . . . . .

4. And be it further enacted by the authority aforesaid, That all tenures hereafter to be created by the king's majesty, his heirs or successors, upon any gifts or grants of any manors, lands, tenements, or hereditaments, of any estate of inheritance at the common law, shall be in free and common socage, and shall be adjudged to be in free and common socage only, and not by knight-service, or *in capite*, and shall be discharged of all wardship, value and forfeiture of marriage, livery, primer seisin, *ousterlemain*, *aide pur faire fitz chivalier* and *pur file marrier;* any law, statute or reservation to the contrary thereof in any wise notwithstanding.

5. ESTATES

BLACKSTONE, COMMENTARIES, II, 103–107.

The next objects of our disquisitions are the nature and properties of *estates*. An *estate* in lands, tenements, and hereditaments, signifies such *interest* as the tenant has therein: so that if a man grants all *his estate* in Dale to A. and his heirs, every thing that he can possibly grant shall pass thereby. It is called in Latin *status;* it signifying the condition or circumstance in which the owner stands with regard to his property. And to ascertain this with proper precision and accuracy, estates may be considered in a threefold view:—*first*, with regard to the *quantity of interest* which the tenant has in the tenement: *secondly*, with regard to the *time* at which that quantity of interest is to be enjoyed: and, *thirdly*, with regard to the *number* and *connections* of the tenants.

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus,

either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. And this occasions the primary division of estates into such as are *freehold* and such as are *less than freehold.*

An estate of freehold *liberum tenementum*, or franktenement, is defined by Britton to be "the *possession* of the soil of a freeman." And St. Germyn tells us that "the possession of the land is called in the law of England the franktenement or freehold." Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold:* which actual possession can, by the course of the common law, be only given by the ceremony called livery of seisin, which is the same as the feodal investiture. And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin, or, in tenements of any incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton, that where a freehold shall pass, it behooveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates.

Estates of freehold (thus understood) are either estates *of inheritance*, or estates *not of inheritance.* The former are again divided into inheritances *absolute* or fee-simple; and inheritances *limited*, one species of which we usually call fee-tail.

1. Tenant in fee-simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever: generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law. The true meaning of the word fee (*feodum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium;* which latter the writers on this subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo*,

in his own demesne. But *feodum*, or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. . . .

This is the primary sense and acceptance of the word *fee*. But (as Sir Martin Wright very justly observes) the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee* therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it, (as a fee, or a fee-simple,) it is used in contradistinction to a fee-conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man.

Taking therefore *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal. But there is this distinction between the two species of hereditaments: that, of a corporeal inheritance a man shall be said to be seised *in his demesne, as of fee;* of an incorporeal one, he shall only be said to be seised *as of fee*, and not in his demesne. For, as incorporeal hereditaments are in their nature collateral to, and issue out of, lands and houses, their owner hath no property, *dominicum*, or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitutes*, or services, of the civil law. The *dominicum* or property is frequently in one man while the appendage or service is in another. Thus Caius may be seised *as of fee* of a way leading over the land, of which Titius is seised *in his demesne as of fee.*

The fee-simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee-simple remains vested in him and his heirs; and after the determination of those years or

lives, the land reverts to the grantor or his heirs, who shall hold it again in fee-simple. Yet sometimes the fee may be in *abeyance*, that is, (as the word signifies,) in expectation, remembrance, and contemplation in law; there being no person in *esse* in whom it can vest and abide: though the law considers it as always potentially existing and ready to vest whenever a proper owner appears. Thus in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis:* it remains therefore in waiting or abeyance, during the life of Richard. This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance. And not only the fee, but the freehold also, may be in abeyance, as, when a parson dies, the freehold of his glebe is in abeyance until a successor be named, and then it vests in the successor.

STATUTE OF WESTMINSTER II, c. 1 (*De Donis Conditionalibus*) 1285.

First, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, with such condition expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall revert to the giver or his heir; in case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir; in case also where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore nor yet is observed. In all the cases aforesaid after issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift; and further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir by form of gift expressed in the deed, though the issue, if any were, had died; yet by the deed and feoffment of them, to whom land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenements

which was directly repugnant to the form of the gift: wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing. Neither shall the second husband of any such woman from henceforth have anything in the land so given upon condition after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land was so given, it shall come to their issue or return unto the giver or his heir as before is said. . . . And it is to wit that this statute shall hold place touching alienation of land contrary to the form of gift hereafter to be made, and shall not extend to gifts made before. And if a fine be levied hereafter upon such lands it shall be void in the law, neither shall the heirs or such as the reversion belongeth unto, though they be of full age, within England, and out of prison, need to make their claim.

LITTLETON, TENURES, §§ 13–16 (*temp.* Edw. IV). (The book was written in French. The translation is Lord Coke's.)

Tenant in fee taile is by force of the statute of W. 2, cap. 1, for before the said statute all inheritances were fee simple, for all the gifts which be specified in that statute were fee simple conditional at the common law, as appeareth by the rehearsall of the same statute. And now by this statute, tenant in taile is in two manners, that is to say, tenant in taile generall and tenant in taile speciall.

Tenant in taile generall is, where lands or tenements are given to a man, and to his heires of his bodie begotten. In this case it is said generall taile, because whatsoever woman, that such tenant taketh to wife (if he hath many wives, and by every of them have issue), yet everie one of these issues by possibilitie may inherit the tenements by force of the gift; because that everie such issue is of his bodie ingendred.

In the same manner it is, where lands or tenements are given to a woman, and to the heires of her bodie; albeit that she hath

divers husbands, yet the issue, which she may have by every husband, may inherit as issue in taile by force of this gift; and therefore such gifts are called generall tailes.

Tenant in taile speciall is where lands or tenements are given to a man and to his wife, and to the heires of their two bodies begotten. In this case none shall inherit by force of this gift, but those that be engendred between them two. And it is called especiall taile, because if the wife die, and he taketh another wife, and have issue, the issue of the second wife shall not inherite by force of this gift, nor also the issue of the second husband, if the first husband die.

NEW YORK REAL PROPERTY LAW, § 32.

Estates tail have been abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed before the twelfth day of July, seventeen hundred and eighty-two, shall be deemed a fee simple; and if no valid remainder be limited thereon, a fee simple absolute. Where a remainder in fee shall be limited on any estate which would be a fee tail, according to the law of this state, as it existed previous to such date, such remainder shall be valid, as a contingent limitation on a fee, and shall vest in possession on the death of the first taker, without issue living at the time of such death.

KENT, COMMENTARIES, IV, 14.

Estates tail were introduced into this country with the other parts of the English jurisprudence, and they subsisted in full force before our revolution, subject equally to the power of being barred by a fine or common recovery. But the doctrine of estates tail, and the complex and multifarious learning connected with it, have become quite obsolete in most parts of the United States. In Virginia, estates tail were abolished as early as 1776; in New Jersey, estates tail were not abolished until 1820; and in New York, as early as 1782, and all estates tail were turned into estates in fee simple absolute. So, in North Carolina, Kentucky, Tennessee, and Georgia, estates tail have been abolished, by being converted by statute into estates in fee simple. In the States of Vermont, South Carolina, and Louisiana, they do not appear to be known to their laws, or ever to have existed. . . .

BLACKSTONE, COMMENTARIES, II, 120–121, 126–127, 129, 140, 143–144, 146, 150.

We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the act of the parties; others merely *legal*, or created by construction and operation of law. We will consider them both in their order.

1. Estates for life, expressly created by deed or grant, (which alone are properly conventional,) are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one, in any of which cases he is styled tenant for life; only when he holds the estate by the life of another, he is usually called tenant *pur auter vie*. These estates for life are, like inheritances, of feodal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen) was not in its original hereditary. They are given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A. B. the manor of Dale, this makes him tenant for life. For though, as there are no words of inheritance or *heirs* mentioned in the grant, it cannot be construed to be a fee, it shall however be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for a term of life generally, shall be construed to be an estate for the life *of the grantee;* in case the grantor hath authority to make such grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor, unless in the case of the king.

Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life for which they are created expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency

happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law: for which reason in conveyances the grant is usually made "for the term of a man's *natural* life"; which can only determine by his *natural* death.

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Tenant *by the curtesy of England* is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall on the death of his wife, hold the lands for his life, as tenant by the curtesy of England. . . .

There are four requisities necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife. 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife; as in case of an advowson, where the church has not become void in the lifetime of the wife: which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem*.

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Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies: in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.

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Of estates that are less than freehold, there are three sorts: 1. Estates for years: 2. Estates at will; 3. Estates by sufferance.

1. An estate for *years* is a contract for the possession of lands or tenements for some determinate period; and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings; a year being the shortest term which the law in this case takes notice of.

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Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning and certain end. But *id certum est, quod certum reddi potest:* therefore if a man make a lease to another for so many years as J. S. shall name, it is a good lease for years; for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease. A lease for so many years as J. S. shall live is void from the beginning; for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease. And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good: for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S., or his ceasing to be parson there.

We have before remarked, and endeavored to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur auter vie*, is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate. Hence it follows, that a lease for years may be made to commence *in futuro*, though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro;* because it cannot be created at common law without

livery of seisin, or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini:* but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed*, not properly of the land, but of the term of years; the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word *term* does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time;* as by surrender, forfeiture, and the like. For which reason, if I grant a lease to A. for the term of three years, and, after the expiration of the said *term*, to B. for six years, and A. surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder had been to B. from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B.'s interest will not commence till the time is fully elapsed, whatever may become of A.'s term.

The second species of estates not freehold are estates *at will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will, is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connection with the other at his own pleasure. Yet this must be understood with some restriction. For if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress and regress, to cut and carry away the profits. And this for the same reason upon which all the cases of emblements turn; *viz.*, the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is

for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.

What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land, or notice must be given to the lessee) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber, taking a distress for rent, and impounding it thereon, or making a feoffment, or lease for years of the land to commence immediately; any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure; or, which is *instar omnium*, the death or outlawry of either lessor or lessee; puts an end to or determines the estate at will

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An estate at *sufferance* is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. Or, if a man maketh a lease at will and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect in not entering and ousting the tenant, is ever imputed by law; but his tenant, so holding over, is considered as an absolute intruder. But in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant: for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger: and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful; unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

LITTLETON, TENURES, § 19.

In every gift in taile without more saying, the reversion of the fee simple is in the donor.

COKE, COMMENTARY ON LITTLETON, 22*b*.

A reversion is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here in the case of *Litt.* tenant in fee simple maketh gift in taile; so it is of a lease for life, or for yeares.

BLACKSTONE, COMMENTARIES, II, 163–165.

An estate then in *remainder* may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs forever: here A. is tenant for years, remainder to B. in fee. In the first place an estate for years is created or carved out of the fee, and given to A.; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole:* they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A. for twenty years, and after the determination of the said term, to B. for life; and after the determination of B.'s estate for life, it be limited to C. and his heirs forever; this makes A. tenant for years, with remainder to B. for life, remainder over to C. in fee. Now, here the estate of inheritance undergoes a division into three portions: there is first A.'s estate for years carved out of it; and after that B.'s estate for life; and then the whole that remains is limited to C. and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing: upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple: because a

fee-simple is the highest and largest estate that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore, which is only a portion, or residuary *part*, of the estate cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple: as £40 is part of £100 and £60 is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole £100 is appropriated, there can be any residue subsisting.

6. CO-OWNERSHIP

BLACKSTONE, COMMENTARIES, II, 179–181, 184–5, 186–189, 191–193, 194.

We come now to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways; in severalty, in joint-tenancy, in coparcenary, and in common.

I. He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a *plurality* of tenants.

II. An estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. In consequence of such grants an estate is called an estate in joint-tenancy, and sometimes an estate in *jointure*, which word as well as the other signifies a union or conjunction of interest; though in common speech the term

jointure is now usually confined to that joint-estate which, by virtue of the statute 27 Hen. VIII. c. 19, is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.

In unfolding this title, and the two remaining ones, in the present chapter, we will first inquire how these estates may be *created;* next, their *properties* and respective *incidents;* and lastly, how they may be *severed* or *destroyed.*

1. The *creation* of an estate in joint-tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

2. The *properties* of a joint-estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession;* or, in other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

. . . . . .

From the same principle also arises the remaining grand incident of joint estates; viz., the doctrine of *survivorship:* by which when two or more persons are seised of a joint-estate, of inheritance, for their own lives, or *pur auter vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance, or a common freehold only, or even a less estate. This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint-tenants is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of either) the interest becomes separate

and distinct: the joint-tenancy instantly ceases. But, while it continues, each of two joint-tenants has a concurrent interest in the whole; and therefore on the death of his companion, the sole interest in the whole remains to the survivor. For the interest which the survivor originally had is clearly not devested by the death of his companion; and no other person can now claim to have a *joint*-estate with him, for no one can now have an interest in the whole, accruing by the same title and taking effect at the same time with his own; neither can any one claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all and every part. As therefore the survivor's original interest in the whole still remains, and as no one can now be admitted, either jointly or severally, to any share with him therein, it follows, that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors: or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem.*" And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king, nor any corporation, can be a joint-tenant with a private person. For here is no mutuality: the private person has not even the remotest chance of being seised of the entirety by benefit of survivorship; for the king and the corporation can never die.

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III. An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law or particular custom. By common law: as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are then called *coparceners;* or, for brevity, *parceners* only. *Parceners* by particular custom are where lands descend, as in gavelkind, to all the males in equal degree as sons, brothers, uncles, etc. And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.

The *properties* of parceners are in some respects like those of joint-tenants; they having the same unities of *interest*, *title*, and *possession*. They may sue and be sued jointly for matters relating to their own lands; and the entry of one of them shall in some cases enure as the entry of them all. They cannot have an action of trespass against each other; but herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry the Eighth joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points. 1. They always claim by descent; whereas joint-tenants always claim by purchase. Therefore, if two sisters purchased lands to hold to them and their heirs, they are not parceners, but joint-tenants; and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of time necessary to an estate in coparcenary. For if a man had two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs are still parceners; the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have a *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*.

. . . . . .

IV. Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously. This tenancy therefore happens where there is a unity of possession merely, but perhaps an entire disunion of interest, of title and of time. For if there be two tenants in common of lands, one may hold his

part in fee-simple, the other in tail, or for life; so that there is no necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A., the other by purchase from B.; so that there is no unity of title; one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession: and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest. As, if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenant are tenants in common; for they have now several titles, the other joint-tenant by the original grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So, if one joint-tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common, as holding by different titles and conveyances. If one of two parceners alienes, the alienee and the remaining parcener are tenants in common; because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint-tenants of the life-estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman*, and the heirs of their bodies begotten: and in this, and the like cases, their issue shall be tenants in common; because they must claim by different titles, one as heir of A., and the other as heir of B.; and those two not titles by purchase, but descent. In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

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As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III., before mentioned, to make partition

of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22, and 4 Anne, c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate; though, if one actually turns the other out of possession, an action of ejectment will lie against him. But, as for other incidents of joint-tenants, which arise from the privity of title, or the union and entirety of interest, (such as joining or being joined in actions unless in the case where some entire or indivisible thing is to be recovered,) these are not applicable to tenants in common whose interests are distinct, and whose titles are not joint but several.

KENT, COMMENTARIES, IV, 361.

The common law favored title by joint-tenancy, by reason of this very right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services and weaken the efficacy of that connection. But in Hawes *v.* Hawes, 1 Wils. Rep. 165, Lord Hardwicke observed that the reason of that policy had ceased with the abolition of tenures; and he thought that even the courts of law were no longer inclined to favor them, and, at any rate, they were not favored in equity, for they were a kind of estates that made no provision for posterity. As an instance of the equity view of the subject, we find that the rule of survivorship is not applied to the case of money loaned by two or more creditors on a joint mortgage. The right of survivorship is also rejected in all cases of partnerships, for it would operate very unjustly in such cases. In this country the title by joint-tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in the case of titles held by trustees.

NEW YORK REAL PROPERTY LAW, § 66.

Every estate granted or devised to two or more persons in their own right shall be a tenancy in common, unless expressly declared to be in joint tenancy; but every estate, vested in executors or

trustees as such, shall be held by them in joint tenancy. This section shall apply as well to estates already created or vested as to estates hereafter granted or devised.

[This was originally enacted in 1786.]

SMITH, PERSONAL PROPERTY, § 27.

The principal incidents of ownership in common are:

First. The possession of one is the possession of all, and all are equally entitled to possession.

Second. One cannot maintain an action against his co-tenant to recover possession of the common property; but he may have an action of tort against him for its conversion or destruction. A use of property which amounts to destruction or spoliation constitutes conversion and will authorize an action by those injured.

Third. The interest of one is subject to levy and sale by execution for his debts; but if the officer sell the whole property, and not merely the interest of the judgment debtor, he will be liable to an action by the other co-owner for his undivided interest.

Fourth. One owner in common of chattels may recover from another any money properly expended on it beyond his due proportion; but there must have been a previous request to join in making the necessary repairs, unless there exist some agreement or prescription binding either party exclusively to make repairs.

Fifth. Where personal property in common bulk and of the same quality, severable in its nature, is owned by two or more persons in common, each may sever and appropriate his share if it can be determined by measurement or weight, without the consent of the others, and without liability to an action for the conversion of the common property.

Sixth. Owners in common of personal property may maintain a suit in equity for partition; and in case a division be impracticable, they may have a decree for the sale of the common property, and a division of the proceeds. But they are not entitled to compensation from each other for services rendered in the care of the common property, in the absence of an agreement to that effect.

7. INCIDENTS OF OWNERSHIP

HEARN, THEORY OF LEGAL DUTIES AND RIGHTS, 186.

The rights which collectively constitute ownership are the right to possess, the right to use, the right to the produce, the right to

waste, the right of disposition, whether during life or upon death, and the right to exclude all other persons from any interference with the thing owned. In the language of the Civilians, *dominium* includes *jus possidendi, jus utendi, jus fruendi, jus abutendi, jus disponendi,* and *jus prohibendi.*

COKE, COMMENTARY ON LITTLETON, 4*a*.

"*Land,*" *Terra,* in the legal signification, comprehendeth any ground, soile, or earth whatsoever; as meadowes, pastures, woods, moores, waters, marishes, furses, and heath. . . It legally includeth also all castles, houses, and other buildings: for castles, houses, etc., consist upon two things, *viz.* land or ground, as the foundation or structure thereupon; so as passing the land or ground, the structure or building thereupon passeth therewith.

Also, the waters that yeeld fish for the food and sustenance of man are not by that name demandable in a *praecipe;* but the land whereupon the water floweth or standeth is demandable; as for example, *viginti acras terrae aqua coopertas:* and besides, the earth doth furnish man with many other necessaries for his use, as it is replenished with hidden treasures; namely, with gold, silver, brasse, iron, tynne, leade, and other metals, and also with a great varietie of precious stones, and many other things for profit, ornament, and pleasure. And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum, ejus est usque ad coelum* as is holden 14 H. 8. fo. 12; 22 Hen. 6. 59; 10 E. 4. 14; *Registrum origin.* and in other bookes.

BROOM, LEGAL MAXIMS (8 ed.), 314.

QUICQUID PLANTATUR SOLO SOLO CEDIT. — *Whatever is affixed to the soil belongs thereto.*

It may be stated, as a general rule of great antiquity, that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is subjected to the same rights of property as the soil itself. In the Institutes of the Civil Law it is laid down, that if a man build on his own land with the materials of another, the owner of the soil becomes, in law, the owner also of the building: *quia omne quod solo inaedificatur solo cedit.* In this case, indeed, the property in the materials used still continued in the original owner; and although, by a law of the XII. Tables, the object of which was to prevent the destruction of buildings, he was unable,

unless the building were taken down, to reclaim the materials *in specie*, he was, nevertheless, entitled to recover double their value as compensation by the action *de tigno juncto*. On the other hand, if a person built, with his own materials, on the land of another, the house likewise belonged to the owner of the soil; for in this case, the builder was presumed intentionally to have transferred his property in the materials to such owner. In like manner, if trees were planted or seed sown in the land of another, the owner of the soil became owner also of the tree, the plant, or the seed, as soon as it had taken root. And this latter proposition is fully adopted, almost in the words of the civil law, by our own law writers — Britton, Bracton, and the author of Fleta.

BLACKSTONE, COMMENTARIES, II, 122–123.

Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore if a tenant for his own life sows the lands and dies before harvest, his executors shall have the *emblements* or profits of the crop: for the estate was determined by the *act of God*, and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The representatives, therefore, of the tenant for life, shall have the emblements to compensate for the labour and expense of tilling, manuring and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year; but if he died between the beginning of March and the end of August, the heirs of the tenant received the whole. From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is, also, if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* shall have the emblements. The same is also the rule, if a life estate be determined by the *act of law*. Therefore if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, the husband shall have the emblements in this case; for the sentence of divorce is the act of law. But if an

estate for life be determined by the tenant's *own act* (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry), in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit trees, grass, and the like; which are not planted annually at the expense and labour of the tenant, but are either a permanent or natural profit of the earth. For when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to him in future, and to future successionsof tenants.

In *Blades* v. *Higgs*, 11 H. L. Cas., 631, Lord Westbury says: My Lords, when it is said by writers on the Common Law of England that there is a qualified or special right of property in game, that is in animals *ferae naturae* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill and appropriate such animals, which is sometimes called by the law a reduction of them into possession.

This right is said in law to exist *ratione soli*, or *ratione privilegii* for I omit the two other heads of property in game which are stated by Lord Coke, namely *propter industriam* and *ratione impotentiae*, for these grounds apply to animals which are not in the proper sense *ferae naturae*. Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *ferae naturae* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

Property *ratione privilegii* is the right which, by a peculiar franchise anciently granted by the Crown in virtue of its prerogative, one man had of killing and taking animals *ferae naturae* on the land of another; and in like manner the game, when killed or taken by virtue of the privilege, became the absolute property of the owner of the franchise, just as in the other case it becomes the absolute property of the owner of the soil.

[But see Cooley, Torts, 436; *Ex parte* Bailey, 155 Cal. 472; *Greer* v. *Connecticut*, 161 U. S. 519.]

In *Birmingham* v. *Allen*, 6 Ch. Div. 284, Jessel, M. R., says: As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse* v. *Bonomi*, 9 H. L. C. 503, that every landowner in the kingdom has a right to the support of his land in its natural state. It is not an easement: it is a right of property. That being so, if the plaintiff's land had been in its natural state, no doubt the defendants must not do anything to let that land slip, or go down, or subside.

In *Embrey* v. *Owen*, 6 Ex. 353, Parke, B., says: The right to have the stream to flow in its natural state without diminution or alteration is an incident to the

property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only; see 5 B. & Ad. 24. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.

The right to the benefit and advantage of the water flowing past his land is not an absolute and exclusive right to the flow of *all* the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

8. RIGHTS IN ANOTHER'S PROPERTY

HEARN, THEORY OF LEGAL DUTIES AND RIGHTS, 209.

There are certain rights that are usually known by the abbreviated phrase *jura in re*, and that are fully described as *jura in rem in re aliena*. They are, or at all events belong to, the "*res incorporales*," the "*ea quae in jure consistunt*," of the Roman jurists, the incorporeal hereditaments of English law. The examples which Blackstone enumerates are advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents. I am not concerned to defend this enumeration. It sufficiently illustrates the nature of the rights in question. Perhaps in modern law it might be sufficient to speak of easements, licenses, public rights of way, whether by land or water, franchises, and annuities, or other charges. When two or more persons have different interests in the same property, the matter may be regarded under different aspects. We may look at the quantity of interest of the smaller holder, or we may look at the diminution of the enjoyment of the larger holder. The former is the stand-point of our law; the latter is that of the Romans and of their descendants. Accordingly, that part of the law which we describe as treating of modes of ownership or limited interests the Romans called the law of servitudes or burthens upon property. There are certain other rights *in re aliena*, which, although they are equally with the larger interests rights *in rem*, our law agrees with the Roman law in regarding not as estates in land but as burthens upon it. Of these rights one is that class of "real servitudes," or *servitutes rerum*, which we call easements.

SCHEME OF RIGHTS IN ANOTHER'S PROPERTY IN ANGLO-AMERICAN LAW

- (*a*) Servitudes
  - Profits
  - Easements
  - Covenants running with the land
  - Equitable servitudes (equitable easements, covenants running with property in equity)
- (*b*) Securities
  - Pledge
  - Mortgage
  - Common-law liens
  - Statutory liens
  - Equitable charges or liens

A servitude is a burden resting upon some particular piece of property for the benefit of a person (in which case it is said to be personal or in gross) or of another piece of property (in which case it is said to be praedial or to be appurtenant to the latter property) whereby the former (spoken of as the servient property, tenement or estate) is said to serve the latter. If the servitude is praedial or appurtenant, the property for the benefit whereof it exists is said to be the dominant property, tenement or estate. In Anglo-American law, all servitudes are appurtenant except profits, which may be either in gross or appurtenant.[1] The servitude may bind the owner of the servient property to permit the owner of the servitude or the owner for the time being of the dominant property to take something from the servient property, whether produce, as a right to pasture cattle on another's land, or some incident of ownership of the soil, as a right to mine on another's land. In such case, it is called a profit. Or the servitude may bind the owner of the servient property to permit the owner of the dominant property for the time being to do something upon the servient property, or may restrict the use of the servient property for the benefit of the dominant property. In such case it is called an easement. Examples are, a right of way, a right to maintain a ditch or drain across another's land, a right to use another's wall in building on one's land adjoining, and in England a right to have light and air unobstructed by buildings on the servient land. Such servitudes are created by grant or acquired by prescription (long adverse use). Restrictions upon the use of land may be imposed upon an estate in the land for the benefit of the reversion by covenant and in that case the covenant is said to run with the land, that is the estate for life or for years is a servient estate and the reversion a dominant estate with respect to the servitude thereby created. In the United States this imposition of restrictions by covenant which will run with the land at law is permitted in some cases upon conveyance of a fee simple. For the most part, however, if restrictions may be imposed on conveyance of a fee, it must be by way of equitable servitudes (equitable easements, covenants running with the land in equity) which are cognizable and enforceable only in equity and hence are not available against a purchaser for value without notice as a legal servitude would be. The common law recognizes servitudes in land only. But equitable servitudes may exist to some extent with respect to personal property.

[1] There is some question in America as to easements in gross.

Servitudes leave the substance of the thing subject thereto undisturbed. A security or lien gives a right to the holder thereof to hold another's property as security for the payment of a debt or performance of an act or even to appropriate such property or the proceeds of sale by way of satisfaction. A pledge is a bailment of personal property by way of security. In case of default, the legal remedy today is to sell the property pledged, after notice to the pledgor, and apply the proceeds to satisfaction of the claim secured. A mortgage, whether of land or of chattels, is at common law a conveyance upon condition subsequent by way of security. The condition is that if a debt is paid or other act performed at the time and in the manner provided, the conveyance shall become void, otherwise to remain in full force and effect. Accordingly if the condition is performed, the title of the mortgagee comes to an end and the property is once more in the mortgagor; if the condition is not performed, the conveyance becomes absolute and the legal title is indefeasibly in the mortgagee. But equity regards the mortgagor as in substance the owner and looks upon the mortgage as in substance a security only. Hence it will allow the mortgagor to redeem, that is to pay the debt and obtain a reconveyance, unless this right to redeem (called the equity of redemption) is cut off by foreclosure. A foreclosure is had in equity by decree requiring redemption within a time fixed by the court or in default thereof directing sale of the property and satisfaction of the debt out of the proceeds. There are statutes in many jurisdictions providing for legal foreclosure by sale. Also in many jurisdictions by statute the mortgagor is owner of the property and the mortgagee has merely a power to have it sold by way of satisfaction in case of default.

KENT, COMMENTARIES, II, 634–635, 636–637.

A *general* lien is the right to retain the property of another, for a general balance of accounts; but a *particular* lien is a right to retain it only for a charge on account of labor employed or expenses bestowed upon the identical property detained. The former is taken strictly, but the latter is favored in law. The right rests on principles of natural equity and commercial necessity, and it prevents circuity of action and gives security and confidence to agents.

Where a person, from the nature of his occupation, is under obligation, according to his means, to receive, and be at trouble and expense about the personal property of another, he has a particular lien upon it; and the law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the public. Upon this ground, common carriers, inn-keepers, and farriers, had a particular lien by the common law; for they were bound, as Lord Holt said, to serve the public to the utmost extent and ability of their employment, and an action lies against them if they refuse, without adequate reason. But though the right of lien probably originated in those cases in which there was an obligation, arising out of the public employment, to

receive the goods, it is not now confined to that class of persons; and, in a variety of cases, a person has a right to detain goods delivered to him to have labor bestowed on them, who would not be obliged to receive the goods, in the first instance, contrary to his inclination. It is now the general rule, that every bailee for hire, who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. A tailor, or dyer, is not bound to accept an employment from any one that offers it, and yet they have a particular lien, by the common law upon the cloth placed in their hands to be dyed, or worked up into a garment. The same right applies to a miller, printer, tailor, wharfinger, or whoever takes property in the way of his trade or occupation, to bestow labor or expense upon it; and it extends to the whole of one entire work upon one single subject, in like manner as a carrier has a lien on the entire cargo for his whole freight. The lien exists equally, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price.

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A general lien for a balance of accounts is founded on custom, and is not favored; and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it. General liens are looked at with jealousy, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors.

But by the custom of the trade, an agent may have a lien upon the property of his employer, intrusted to him in the course of that trade, not only in respect to the management of that property, but for his general balance of accounts. The usage of any trade sufficient to establish a general lien, must, however, have been so uniform and notorious, as to warrant the inference that the party against whom the right is claimed had knowledge of it. This general lien may also be created by express agreement.

By statutes liens are now given in many other cases, sometimes to bailees, as at common law, sometimes to persons who have not possession, as in the case of mechanics' and laborers' liens. These statutory liens are made enforceable by sale or, as in the case of mechanics' liens, by judicial foreclosure.

Equity also imposes liens or charges upon property in order to prevent unjust enrichment of one at the expense of another or in order to give effect to the substance as contrasted with the form of transactions. Examples are, contracts to give mortgages or pledges which are treated in equity as creating a lien at once, though the necessary legal transactions to carry out the contract are not had, expenditure of money by a co-owner upon the property owned in common,

where in certain cases equity requires the shares of the other co-owners to stand as security, and in England and many of the United States, conveyance of land to a purchaser who has not paid the purchase money or part of it, in which case the land is subjected in equity to a lien in favor of the vendor for such money. Equitable liens are not available against purchasers for value without notice.

9. ACQUISITION OF PROPERTY

BARON, TEXT BOOK OF THE MODERN ROMAN LAW (*Pandekten*) § 130

1. We call a mode of acquisition derivative if the ownership of him who acquires is based upon that of him who previously owned it; he who acquires the property is the successor of the previous owner, and he acquires it to the extent that the latter had it. The effect of the derivative mode of acquisition rests either upon the will of the previous owner (as in case of delivery, testamentary succession, legacy) or upon a judicial decree (as in adjudication, ... execution of a judicial decision) or finally upon a statutory direction (as in intestate succession and the forfeiture of property). . . .

2. We call a mode of acquisition original if the ownership of him who acquires does not rest upon the right of another. This is the case not only if no ownership in the thing existed before the acquisition (as in case of things newly coming into existence, and ownerless things), but also if, indeed, ownership already existed in a person, but there is no connection between the ownership of this person and that of him who acquires. Accordingly, modes of original acquisition fall into two classes: (1) acquisition of things newly arising or hitherto ownerless, (2) acquisition of things formerly owned by some one. In the first class belong acquisition of *fructus*, . . . through occupation, through specification, . . ; in the second class, acquisition by confusion and accession, and by adverse possession.

SCHEME OF MODES OF ACQUISITION IN ANGLO-AMERICAN LAW

- Original
  - Occupancy
    - [Goods of an alien enemy]
    - Abandoned chattels
    - Wild animals
    - Fruits of land
  - Alluvion
  - Sale for taxes
  - Sale under judgment *in rem* (e.g. for forfeiture under revenue laws)
  - Adverse possession, prescription
  - Accession
  - Confusion
- Derivative
  - Judgment
  - Marriage
  - Bankruptcy
  - Succession { intestate / testamentary } See *infra* § 10
  - Gift
  - Sale
  - Conveyance

BLACKSTONE, COMMENTARIES, II, 401–405.

1. Thus, in the first place, it hath been said, that any body may seize to his own use such goods as belong to an alien enemy. For such enemies, not being looked upon as members of our society, are not entitled during their state of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattels, without being compelled, as in other cases, to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown; and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And, therefore, it hath been holden, that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. . . .

2. Thus again, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen, are vested by law in the king, and form a part of the ordinary revenue of the crown.

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4. With regard, likewise, to animals *ferae naturae* all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or if dead, are *absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offense, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of *game;* the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But

those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game, itself, till these civil prohibitions were issued; there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

5. To this principle of occupancy, also, must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements*, by any *possessor* of the land who hath sown or planted it, whether he be owner of the inheritance, or of a less estate, which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills, and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action; and by the statute 11 Geo. II, c. 19, though not by the common law, they may be distreined for rent arrere. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given; and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distreinable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny before they are severed from the ground.

6. The doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled, by his right of possession, to the property of it under such its state of improvement: but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts.

It hath even been held, that if one takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman.

7. But in the case of *confusion* of goods, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares. But if one willfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent.

BLACKSTONE, COMMENTARIES, II, 198–199.

If a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession*, and *right of property*. If the disseisor dies, and the land descend to his son, the son gains an *apparent* right of *possession;* but I still retain the *actual* right both of *possession* and *property*. If I acquiesce for thirty years without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain nothing but the *mere right of property*. And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of *sixty* years.

COOLEY'S NOTE to the foregoing extract.

The term is now twenty years; see the statute of 3 and 4 Wm. IV, c. 27, s. 2. And by that statute it is provided that the right and title of the person who might, within the time limited, have had the proper remedy, but who has failed to resort to it, shall be *extinguished*.

In general, twenty years, after the right accrues, will be found to be the period limited by statute in the American states, within which the owner must bring action for recovery of real estate.

Exceptions are generally made in these statutes in favor of infants, married women, insane persons, persons beyond the seas, and sometimes other classes.

DIGBY, HISTORY OF THE LAW OF REAL PROPERTY, Chap. X, § 1.

Before the passing of the Prescription Act [1] this mode of acquiring rights *in alieno solo* was regarded exclusively as a species of title by grant, differing only from an express grant in the evidence by which it was established. If it be proved that the right has been in fact enjoyed as far back as memory can trace it, and no origin of the right be shown, the presumption is that it has been enjoyed from time immemorial, that is, from some period anterior to the first year of Richard I., the time at which legal memory commences, and that it was created before that period by the owner of the soil. And even if the right were shown to have been created within the time of legal memory, juries were directed, when the right was in question, to presume that as a fact the right had been expressly granted by the owner of the soil, and that the grant had been lost. This mode of supporting rights was felt to be most unsatisfactory, and at length the Prescription Act was passed, by which a perfect title to easements and profits is conferred upon persons who have enjoyed them as of right continuously for certain periods of time specified in the Act. Its provisions are somewhat complicated, but the practical effect is that the enjoyment of an easement, as, for instance, of a way or of the access of light and air through a window for twenty years, and the enjoyment of a profit *à prendre*, as, for instance, of pasturage on a common, for thirty years, works the acquisition of the right. The enjoyment must, except in the case of light, be by a person claiming right thereto, hence it may be defeated by showing that it has been enjoyed avowedly in exercise of some continuing permission or authority of the owner of the soil.

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SMITH, PERSONAL PROPERTY (2 ed.) 103–104.

In actions of trover, or of *de bonis asportatis*, if the plaintiff recovers judgment, and obtains satisfaction, the title to the property in question is transferred to the defendant; the damages recovered being regarded as the price of the chattel so transferred by operation of law.

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[1] 2 & 3 Will. IV., c. 71.

It is a mooted question whether the recovery of judgment alone, without satisfaction, will transfer the title to the property in question to the defendant. There are cases, English and American, holding the affirmative of the question on, at least, plausible grounds; on the other hand, there are numerous cases holding the negative, the judgment being regarded as a security merely, leaving the title to the property in the plaintiff until payment of the price represented by the judgment.

BLACKSTONE, COMMENTARIES, II, 440–441.

Gifts then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always *gratuitous*, *grants* are upon some *consideration* or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold, which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and, in case of leases, always reserving a rent, though it be but a pepper corn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

Grants or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein, which may be done either in writing, or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII, c. 4, all deeds of gifts of goods, made in trust to the use of the donor, shall be void: because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz. c. 5, every grant

or gift of chattels, as well as lands, with an intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual; and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and also on conviction shall suffer imprisonment for half a year.

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately, as if A gives to B £100, or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense: unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were drawn in, circumvented or imposed upon, by false pretenses, ebriety or surprise. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform, but upon good and sufficient consideration.

KENT, COMMENTARIES, II, 468, 492–493.

A sale is a contract for the transfer of property from one person to another, for a valuable consideration; and three things are requisite to its validity, viz., the thing sold, which is the object of the contract, the price, and the consent of the contracting parties.

(1.) *Of the Thing Sold.* — The thing sold must have an actual or potential existence, and be specific or identified, and capable of delivery, otherwise it is not strictly a contract of sale but a *special* or executory agreement. If the subject-matter of the sale be in existence, and only constructively in the possession of the seller, as by being in the possession of his agent or carrier abroad, it is, nevertheless, a sale, though a conditional or imperfect one, depending on the future actual delivery. But if the article intended to be sold has no existence, there can be no contract of sale.

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When the terms of sale are agreed on, and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is

said at the sale as to the time of delivery, or the time of payment. The payment or tender of the price is, in such cases, a condition precedent, implied in the contract of sale, and the buyer cannot take the goods, or sue for them, without payment; for, though the vendee acquires a right *of property* by the contract of sale, he does not acquire a right *of possession* of the goods until he pays or tenders the price. But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; though the right of possession is not absolute, but is liable to be defeated, if he becomes insolvent before he obtains possession. If the seller has even despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu;* for, though the property is vested in the buyer, so as to subject him to the risk of any accident, he has not an indefeasible right to the possession; and his insolvency, without payment of the price, defeats that right, equally after the *transitus* has begun, as before the seller has parted with the actual possession of the goods.

BLACKSTONE, COMMENTARIES, II, 310–311, 348, 357–360.

A feoffment, *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor;* and the person enfeoffed is denominated the *feoffee*.

This is plainly derived from, or is indeed itself the very mode of, the ancient feodal donation; for though it may be performed by the word "*enfeoff*" or "grant," yet the aptest word of feoffment is, "*do*" or "*dedi*." And it is still directed and governed by the same feodal rules; insomuch that the principal rule relating to the extent and effect of the feodal grant, "*tenor est qui legem dat feudo*," is in other words become the maxim of our law with relation to enfeoffments, "*modus legem dat donationi*." And therefore, as in pure feodal donations, the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse praesumatur quam in donatione expresserit*"; so, if one grants by feoffment lands or

tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed) hath barely an estate for life. For as the personal abilities of the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person, and subsist only for his life; unless the feoffor, by express provision in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance whereby our ancestors were wont to create an estate in fee-simple, by giving the land to the feoffee, to hold to him and his heirs forever; though it serves equally well to convey any other estate or freehold.

But by the mere words of the deed the feoffment is by no means perfected: there remains a very material ceremony to be performed, called *livery of seisin;* without which the feoffee has but a mere estate at will. This livery of seisin is no other than the pure feodal investiture, or delivery of corporeal possession of the land or tenement; which was held absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit*" and an estate was then only perfect, when, as the author of Fleta expresses it in our law, "*fit juris et seisinae conjunctio.*"

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A fine is sometimes said to be a feoffment of record; though it might with more accuracy be called an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of lands: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices: whereby the lands in question become, or are acknowledged to be, the right of one of the parties. In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

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A common recovery is so far like a fine, that it is a suit of action either actual or fictitious: and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror. A recovery, therefore, being in the nature of an action at law, not immediately compromised like a fine, but carried on through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student who is not yet acquainted with the course of judicial proceedings; which cannot be thoroughly explained till treated of at large in the third book of these commentaries. However, I shall endeavor to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms and phrases not hitherto interpreted.

Let us, in the first place, suppose David Edwards to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *praecipe quod reddat*, because those were its initial or most operative words when the law proceedings were in Latin. In this writ the demandant Golding alleges that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings are made up into a record or recovery-roll, in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase to have warranted the title to the tenant; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private: which is (as usual) allowed him. And soon afterward the demandant, Golding, returns to court, but Morland, the vouchee, disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question, against the tenant, Edwards, who is now the recoveree; and Edwards has judgment to recover of

Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter. This is called the recompense, or *recovery in value.* But Jacob Morland having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has only a nominal recompense for the land so recovered against him by Golding; which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple, from Edwards the tenant in tail, to Golding, the purchasor. . .

To such awkward shifts, such subtle refinements, and such strange reasoning were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis.* The design for which these contrivances were set on foot was certainly laudable; the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot admire the means. . . .

The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions.

NEW YORK REAL PROPERTY LAW, §§ 241–242.

§ 241. The conveyance of real property by feoffment, with livery of seizin, or by fines, or common recoveries, is abolished.

§ 242. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property or in any manner relating thereto, can not be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or

operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.

10. SUCCESSION [1]

BLACKSTONE, COMMENTARIES, II, 201.

The methods therefore of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two; *descent*, where the title is vested in a man by the single operation of law: and *purchase*, where the title is vested in him by his own act or agreement.

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor: and an estate, so descending to the heir, is in law called the inheritance.

The doctrine of descents, or law of inheritances in fee-simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee-simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heirs; this is a point that we must result back to the standing law of descents in fee-simple to be informed of.

Extracts from BLACKSTONE, COMMENTARIES, II, 208–234.[2]

The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules or canons

[1] Holmes, Common Law, Lect. X; Maine, Ancient Law, Chaps. VI, VII, and Sir Frederick Pollock's Notes M and N.

[2] These canons have been superseded or much altered by legislation in all jurisdictions. The details of this legislation vary greatly.

of inheritance, according to which, estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.

I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum:* but shall never lineally ascend.

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II. A second general rule or canon is, that the male issue shall be admitted before the female.

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III. A third rule or canon of descent is this: that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together.

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters, Margaret and Charlotte, shall both inherit the estate as coparceners.

. . . . . .

IV. A fourth rule, or canon of descents is this; that the lineal descendants *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*. And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies without other issue; these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte the surviv ng sister shall have six, and her six nieces, the daughters of Margaret, one apiece.

This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done.

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V. A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles, his son, and John dies seised thereof, without issue; whoever suc eeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

. . . . . .

VI. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman of the *whole blood*.

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VII. The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female however near), — unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother; and so on.

SMITH, PERSONAL PROPERTY (2 ed.) 107–108.

The administration of the property of an intestate is based upon the doctrine that his death was an abandonment of title, and that his personalty thereupon became *bona vacantia*, passing to the sovereign as the *parens patriae*, or general trustee of the realm. The *legal* title vests in the crown; the equitable title in decedent's creditors and next of kin.

The same doctrine prevails in the American States, substituting "government" for "king" or "crown," and, as a necessary sequence,

intermediate the death of intestate and the issuance of letters of administration, the legal title to his personal property vests in the government in trust.

There are cases, however, holding that after the death of the intestate his personal property may be considered in abeyance till administration granted, and is then vested in the administrator by relation to the time of decedent's death. . . True, on the appointment of an administrator, the legal title passes to him by operation of law, and relates back to the death of the intestate for the purposes of securing the estate, and protecting persons dealing with parties entitled to administration. The administrator may maintain an action for an unredressed tortious injury to, or conversion of, the property of the estate prior to his appointment. Yet the want of present adequate protection intermediate his appointment and the death of the intestate, might result in irreparable injury to the estate.

While the legal title to the intestate's personal property is in the administrator as trustee, so that for the purposes of administration he may sell the same and give a good title to the purchaser, the next of kin have a vested interest in the surplus of the estate, after the payment of the debts.

The appointment, powers, and duties of an administrator, and the distribution of intestate's personal property, are generally regulated by statute; and the rules of the common law are more or less modified in most, if not all, of the American States.

BLACKSTONE, COMMENTARIES, II, 374–375.

By the common law of England since the conquest, no estate, greater than for term of years, could be disposed of by testament; except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted. And though the feudal restraint on alienations by *deed* vanished very early, yet this on wills continued for some centuries after: from an apprehension of infirmity and imposition on the testator *in extremis*, which made such devises suspicious. Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighborhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

STATUTE OF WILLS, 32 Henry VIII, c. 1.

§ 1. That all and every person and persons, having or which hereafter shall have, any manors, lands, tenements, or hereditaments,

holden in soccage, or of the nature of soccage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, by soccage tenure in chief, or of the nature of soccage tenure in chief, nor of any other person or persons by knights service, from he twentieth day of *July* in the year of our Lord God MDXL., shall have full and free liberty, power and authority to give, dispose, will and devise, as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding.

§ 2. And all and every person and persons, having manors, lands, tenements or hereditaments, holden of the King our sovereign lord, his heirs or successors, in soccage, or of the nature of soccage tenure in chief, and having any manors, lands, tenements or hereditaments, holden of any other person or persons in soccage, or of the nature of soccage tenure, and not having any manors, lands, tenements or hereditaments, holden of the King our sovereign lord by knights service, nor of any other lord or person by like service, from the twentieth day of *July* in the said year of our Lord God MDXL., shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will and testament in writing, or otherwise, by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them, at his free will and pleasure; any law, statute, custom or other thing heretofore had, made or used to the contrary notwithstanding.

§ 3. Saving alway and reserving to the King our sovereign lord, his heirs and successors, all his right, title and interest of *primer seisin* and reliefs, and also all other rights and duties for tenures in soccage, or of the nature of soccage tenure in chief, as heretofore hath been used and accustomed, the same manors, lands, tenements or hereditaments to be taken, had and sued out of and from the lands of his Highness, his heirs and successors, by the person or persons to whom any such manors, lands, tenements or hereditaments shall be disposed, willed or devised, in such and like manner and form, as hath been used by any heir or heirs before the making of this statute; and saving and reserving also fines for alienations of such manors, lands, tenements or hereditaments holden of the King our sovereign lord in soccage, or of the nature of soccage tenure in chief, whereof there shall be any alteration of freehold or inheritance, made by will or otherwise, as is aforesaid.

BLACKSTONE, COMMENTARIES, II, 510–513.

The executor or administrator is to make an *inventory* of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased, and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest; but in case of administrators it is otherwise. Whatever is so recovered, that is of a salable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator; that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered: for,

The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others: as the forfeitures for not burying in woolen, money due upon poor rates, for letters to the post-office, and some others. Fourthly, debts of record; as judgments, docketed according to the statute 4 and 5 W. and M. c. 20, statutes and recognizances. Fifthly, debts due on special contracts; as for rent (for which the lessor has often a better remedy in his own hands by distraining), or upon bonds, covenants, and the like, under seal. Lastly, debts on simple contracts, viz.: upon notes unsealed and verbal promises. Among these simple contracts, servants' wages are by some with reason preferred to any other: and so stood the ancient law, according to Bracton and Fleta, who reckon among the first debts to be paid, *servitia servientium et stipendia famulorum*. Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to. But an executor of his own wrong is not allowed to retain: for

that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of his own wrong, which is contrary to the rule of law. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or not; provided there be assets sufficient to pay the testator's debts: for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.

When the debts are all discharged, the *legacies* claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts.

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is styled the legatee which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee; but the legacy is not perfect without the assent of the executor: for if I have a *general* or *pecuniary* legacy of £100, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law, "*de bonis defuncti primo deducenda sunt ea quae sunt necessitatis, et postea quae sunt utilitatis, et ultimo quae sunt voluntatis.*" And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow any thing by way of abatement, unless there be not sufficient without it. Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid. And this law is as old as Bracton and Fleta, who tell us, "*si plura sint debita, vel plus legatum fuerit, ad quae catalla defuncti non sufficiant fiat, ubique defalcatio, excepto regis privilegio.*"